

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SEVEN**

ALLIED MECHANICAL SERVICES, INC.,

Respondent,

and

Case Nos. 07-CA-040907
07-CA-041390

LOCAL 357, UNITED ASSOCIATION OF
JOURNEYMEN AND APPRENTICES OF THE
PLUMBING AND PIPE FITTING INDUSTRY
OF THE UNITED STATES AND CANADA, AFL-CIO,

Charging Union.


MOTION TO DISMISS AMENDED COMPLIANCE SPECIFICATION BASED ON *OIL CAPITOL SHEET METAL, INC.* OR ALTERNATIVELY FOR SUMMARY JUDGMENT

For the reasons set forth in Respondent Allied Mechanical Services, Inc.'s (AMS's) accompanying Brief in Support of this Motion to Dismiss Amended Compliance Specification Based on *Oil Capitol Sheet Metal, Inc.* or Alternatively for Summary Judgment, AMS files this Motion and attached Brief to be made and argued at the beginning of the compliance hearing currently scheduled to commence on March 2, 2015, before an Administrative Law Judge, if not sooner at the ALJ's direction.

AMS is filing this Motion and Supporting Brief well in advance of the hearing because it involves a threshold legal issue that will eliminate the need for a lengthy compliance trial, and so that the ALJ, Counsel for the General Counsel, and Counsel for the Charging Party will have reasonable notice to facilitate its full consideration and prompt resolution in the interest of judicial economy.

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Attorneys for Respondent

Dated: February 13, 2015

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**BRIEF IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLIANCE
SPECIFICATION BASED ON *OIL CAPITOL SHEET METAL, INC.* OR
ALTERNATIVELY FOR SUMMARY JUDGMENT**

I. INTRODUCTION

This compliance proceeding arises out of a dispute over alleged backpay owed to 11 out of 14 discriminatees stemming from unfair labor practices committed during a union salting campaign. That the 14 discriminatees in this case are “salts” is an unassailable fact. It is based on the parties’ prior admissions, the undisputed facts, and the express, uncontested findings of Administrative Law Judge (ALJ) David Evans who presided over the underlying unfair labor practice proceedings. *Allied Mech. Servs., Inc.*, 341 NLRB 1084 (2004).

Because the discriminatees are salts, *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007) applies and controls the determination of any backpay liability for Respondent Allied Mechanical Services, Inc. (“AMS”). This motion seeks dismissal of (or summary

judgment on) the Amended Compliance Specification based on the General Counsel's burden of proof established by the Board in *Oil Capitol*.

Under *Oil Capitol*, to establish "a reasonable gross backpay amount due," the General Counsel must "present affirmative evidence," proving that each discriminatee would have remained employed by AMS throughout their entire backpay periods as alleged in the Compliance Specification. *Oil Capitol Sheet Metal, Inc.*, 349 NLRB at 1349. If the General Counsel fails to meet that burden, no backpay, reinstatement, or instatement remedy is available. *Id*; see also GC Memo OM 08-29 at p. 2 (2008) ("[T]he General Counsel must now affirmatively prove that salting discriminatees would have worked the entire backpay period alleged in the compliance specification.")

In this case, dismissal and/or summary judgment is required because neither the Region nor the General Counsel can meet this burden. In fact, the Region has confirmed that it will not even try to do so. Instead, the Region has repeatedly taken the position that *Oil Capitol* does not apply as a matter of law. As explained below, the Region is wrong and dismissal on this threshold legal issue is required under controlling Board law. Put simply, no hearing is required when the Region has conducted no investigation regarding the salting backpay periods as required by *Oil Capitol* and will offer no evidence to carry its burden.

II. RELEVANT FACTS

A. Background: The Union's Salting Campaign.

Beginning in the mid-1980s, the Union¹ began a salting campaign against AMS. After employees voted to reject the Union in a 1986 Board election, the Union renewed its attempts to organize AMS in 1990 and filed various unfair labor practice charges against AMS.

¹ Prior to 1998, Local 337 of the Union directed the salting campaign against AMS. In 1998, Local 337 merged with another local union and created Local 357. For the sake of simplicity, AMS will refer only to "the Union" throughout this Motion.

These charges ultimately led to a 1991 settlement agreement where AMS agreed to recognize and bargain with the Union. The parties began to negotiate, but the Union continued its salting campaign against AMS. After bargaining for multiple years, AMS, a construction industry employer, ended what it believed was a voluntary Section 8(f) bargaining relationship under the Board's strong presumption in *Deklewa & Sons*, 282 NLRB 1375 (1987) by withdrawing recognition. The parties, however, disputed whether their 1991 settlement agreement created a Section 8(f) or Section 9(a) relationship, and the Union's salting campaign continued.

The Union used intermittent strikes as one means to effectuate its salting campaign against AMS after the settlement agreement. The Union would direct its salts to strike in an effort to cause AMS to commit unfair labor practices or to pressure AMS in negotiations. These salts would go out on strike for lengthy periods of time, work for other higher-paying union contractors in the interim, and eventually offer to return to work at AMS when instructed to by the Union, principally when the Union's lead organizer David Knapp directed. When AMS accepted the employees offers to return to work, the employees would return to work and then almost immediately go back out on strike. For instance, nine of the salts returned to work on July 9, 1997 and went on strike roughly two weeks later on July 25. (**Exhibit 1**, Tr. at 87.)²

On March 2, 1998, the Union directed 10 of the salts,³ who had been out on strike, to make an offer to AMS to return to work. Tired of the disruptive nature of these intermittent and unprotected strikes, AMS refused to reinstate the salts upon their offer to return in March 1998 on the basis that these individuals had not engaged in protected activity under the Act.

² Relevant portions of the hearing transcript are attached as Exhibit 1.

³ These salts were: Jon Kinney, Tobin Rees, Jim Bronkhorst, Ken Falk, Ted Fuller, Grant Maichele, Marty Preston, Max Roggow, Brian Rowden, and Steve Titus. The other salts in this matter are Harold Hill, Terri Jo Conroy, Jeff Kiss and Scott Calhoun. (**Exhibit 2**, Answer to Amended Compliance Specification.)

Another aspect of the Union's salting campaign involved the Union's lead organizer, David Knapp, sending in "batch applications" to AMS from union salts—a common salting tactic. When sending in these applications, Mr. Knapp took steps to ensure that AMS knew the applications were from union applicants. When AMS did not hire any of these applicants, the Union continued its campaign by filing additional unfair labor practice charges.

The ULP charges giving rise to the current compliance matter included claims that AMS violated Sections 8(a)(1) and (3) of the Act by refusing to reinstate the striking salts and refusing to hire the salts who had applied for work. *Allied Mech. Servs., Inc.*, 341 NLRB 1084 (2004). The General Counsel issued a Complaint against AMS, and the parties had a hearing before ALJ Evans in June and July 1999.

B. The Parties have Admitted That the Discriminatees Are Salts.

At the hearing before ALJ David Evans, the Union and the discriminatees themselves admitted, on multiple occasions, that the discriminatees at issue were union salts. For example, discriminatee James Bronkhorst testified as follows:

Q BY MR. BUDAY: In July of 1997, when you returned to work were you a paid Union Organizer?

A Yes.

Q And you were what is referred to as a salt, correct?

A Yes.

(**Exhibit 1**, Tr. at p. 712.) Likewise, discriminatee Kevin Falk testified that he was salt:

Q Mr. Falk, at the time you were employed by Allied Mechanical Services in 1997, were you a paid union organizer or what's referred to as a salt?

A Yes, sir.

(*Id.* at p. 551.) Discriminatee Max Roggow also admitted that he was a salt:

Q At the time you were employed by Allied Mechanical Services in 1997, you were a paid union organizer, a salt?

A Yes.

(*Id.* at p. 488.)

David Knapp testified that he personally sent in the batch applications for the discriminatees to AMS in furtherance of the salting campaign. Mr. Knapp sent to AMS all of the applications and resumes on behalf of the discriminatees, stamping the certified mail envelope “with [his] union organizer stamp” so that AMS would know that the applications were “coming from the [U]nion.” (**Exhibit 1**, Tr. at 107-110, 193-94, 205-06.) The stamp said “David Knapp, United Association Organizer,” Mr. Knapp created the application forms for the salts, and he directly solicited union members to participate in the salting campaign against AMS. (*Id.*)

C. The ALJ Found that the Discriminatees Were Union Salts.

ALJ Evans held that AMS violated Sections 8(a)(1) and (3) by refusing to reinstate the 10 striking salts. ALJ Evans found it was “undisputed that all of the 10 unreinstated strikers were, at the time that they went on strike, being paid by Local 337 (or one of the other Michigan UA locals) to assist in organizing the Respondent's employees and were therefore ‘salts,’ as that term is commonly used in labor relations law. *Allied Mechanical Services*, 341 NLRB at 1095. ALJ Evans found that the discriminatees “were paid, and paid well, to be salts.” *Id.* at 1101 (emphasis added).

ALJ Evans also held that AMS violated Section 8(a)(1) and (3) by refusing to hire 10 of the 21 salt applicants because of their union membership. ALJ Evans found that AMS “received the union applicants’ resume-applications from [David] Knapp”. *Id.* at 1103, 1105. The ALJ further found that Knapp created “a resume-application form for use by members of

[the Union] who wished to assist him in organizing [AMS] by becoming employee-organizer (salts).” *Id.* at 1103 (emphasis added).

D. The Board Confirmed ALJ Evan’s Findings that the Discriminatees Were Part of a Salting Campaign.

AMS and the General Counsel both filed exceptions to the ALJ’s Decision, and the Charging Party filed cross-exceptions. Significantly, the General Counsel did not except to the ALJ’s findings that the discriminatees were salts or that the Union was engaged in a salting campaign against AMS. (**Exhibit 3**, GC Exceptions.) More importantly, the Board affirmed those findings. *See* 341 NLRB at 1084.

In 2004, the Board held that AMS unlawfully refused to reinstate 10 strikers who made unconditional offers to return to work in March 1998. *Id.* at 1084. The Board also affirmed the ALJ’s finding that AMS unlawfully refused to hire the salt applicants, but only as to four of the 21 salting applicants – Scott Calhoun, Terri Jo Conroy, Harold Hill, and Jeff Kiss. *Id.* at 1085. The Board did not alter ALJ Evans’s findings that these discriminatees were salts, and this portion of the Board’s 2004 Order was eventually enforced by a federal court of appeals after the Board granted reconsideration motions by the Union and General Counsel in 2007 and after the Board denied AMS’s motion for reconsideration in 2010.⁴

III. ARGUMENT

A. The Region has Failed to Conduct its Investigation Consistent with *Oil Capitol Sheet Metal* and Cannot Meet its Burden of Proof.

Because the discriminatees in this case are salts, the General Counsel was required: (1) to conduct an investigation to determine whether each individual would have worked the entire backpay period alleged in the Amended Compliance Specification and (2) to

⁴ A detailed history of this long-running case is beyond the scope of this motion, but *see Allied Mech. Servs., Inc.*, 351 NLRB 79 (2007); *Allied Mech. Servs., Inc.*, 352 NLRB 662 (2008); *Allied Mechanical Servs., Inc.*, 356 NLRB No. 1 (2010); *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758 (D.C. Cir. 2012).

present affirmative evidence to support that allegation. *Oil Capitol*, 349 NLRB at 1349; *see also* GC OM 08-29 (“The Oil Capitol framework applies to all compliance investigations and litigation concerning salting discriminatees, including refusal-to-hire, unlawful discharge, and unlawful layoff cases.”). The Region has conducted no such investigation and will present no such evidence.

This was confirmed in a series of letters and telephone discussions between AMS’s counsel and the Region’s Compliance Officer, through which AMS has repeatedly requested this information.

On October 10, 2012, AMS provided the Region with a letter explaining why the NLRB’s decision in *Oil Capitol* applied. (**Exhibit 4.**) That letter was followed by a telephone discussion with the Compliance Officer on June 13, 2013, where the Compliance Officer explained that the Region decided that *Oil Capitol* did not apply, providing two reasons for the Region’s position. AMS responded on June 21, 2013 explaining why *Oil Capitol* applied despite the Region’s two contentions. (**Exhibit 5.**) In a July 2, 2013 written response, the Region’s Compliance Officer then changed the reasons offered to support the Region’s refusal to apply controlling Board law. (**Exhibit 6.**) AMS responded to that letter on July 11, 2013, again explaining why the Region’s position was not supported by the undisputed facts or Board law. (**Exhibit 7.**) Since then, the Region has held firm and refuses to follow *Oil Capitol* as controlling Board law in this compliance matter.

B. The Region’s Attempts to Avoid *Oil Capitol* are Without Merit.

In an effort to avoid *Oil Capitol*, the Region and General Counsel have taken three positions. First, they allege that *Oil Capitol* does not apply because all of the proceedings in the instant case were completed before *Oil Capitol* was decided. Second, they allege that *Oil*

Capitol does not apply retroactively. Third, and most recently, they attempt to claim that the discriminatees are not salts under Board law.

None of these positions has any merit.

1. The AMS Case Was Pending When *Oil Capitol* Was Decided in 2007.

In *Oil Capitol*, the Board explained that it would “apply this new evidentiary requirement in the present case and in all cases where the discriminatee is a union salt.” 349 NLRB at 1349. This holds true even when the underlying ULP cases were completed before the *Oil Capitol* decision. *E.g., The McBurney Corp.*, 352 NLRB 241, 242 & n.5 (2008) (“Subsequent to the issuance of *Oil Capitol*, the Board has routinely applied *Oil Capitol* in appropriate pending cases, all of which were instituted well before *Oil Capitol* was decided.”)

Nevertheless, the Region has taken the position that *Oil Capitol* is not applicable to these compliance proceedings because the underlying ULP case allegedly concluded before the Board decided *Oil Capitol* on May 31, 2007. (**Exhibit 5** at p. 1.)

That assertion is simply wrong. The Board did not issue its final decision in this case until over three years after the *Oil Capitol* decision. In fact, the Board issued three decisions related to the underlying unfair labor practice proceedings after the Board had decided *Oil Capitol*. First, on September 28, 2007, the Board granted the General Counsel’s and Union’s motions for reconsideration and found that AMS violated Section 8(a)(5) and (1) by withdrawing recognition from the Union. *Allied Mech. Servs., Inc.*, 351 NLRB 79 (2007). Second, on May 30, 2008, a two-member Board panel denied AMS’s motion for reconsideration of the Board’s September 28, 2007 decision. *Allied Mech. Servs., Inc.*, 352 NLRB 662 (2008). Third, on October 14, 2010, after the May 2008 two-member panel decision was vacated following the Supreme Court’s decision in *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), a three-

member panel denied AMS's motion for reconsideration. *Allied Mech. Servs., Inc.*, 356 NLRB No. 1 (2010).

Without question, the instant case was pending at the time that *Oil Capitol* was decided. As such, its application cannot be avoided.

2. The Board Applies *Oil Capitol* Retroactively.

Next, the Region claims that the Board does not apply *Oil Capitol* retroactively. That position conflicts with settled Board law.

As noted above, *Oil Capitol* applies retroactively to all cases decided after its issuance, including those cases where the underlying unfair labor practices were litigated prior to the decision. *Oil Capitol*, 349 NLRB at 1349. This retroactive application of *Oil Capitol* is consistent with the Board's "usual practice [] to apply policies and standards 'to all pending cases in whatever stage.'" *Latino Express, Inc.*, 359 NLRB No. 44 at *3 (2012), quoting *Aramark School Services*, 337 NLRB 1063, 1063 n.1 (2002). Indeed, the General Counsel's OM Memo 08-29 acknowledges that "[a]pplication of Oil Capitol must be considered *in all new and ongoing unfair labor practice and compliance cases where the alleged discriminatee is a salt.*" GC Memo OM 08-29 at p.6 (emphasis added).

Subsequent Board decisions confirm that *Oil Capitol* applies retroactively to compliance cases such as this one. For example, in *Contractor Services, Inc.*, 351 NLRB 33 (2007), a three-member Board panel remanded the case for further consideration in light of *Oil Capitol* because the ALJ had found that one of the discriminatees was a "salt."

Notably, the underlying unfair labor practices in *Contractor Services* occurred in 1995, the Board's decision finding that the employer violated the Act was issued in 1997, and the Board's Order was enforced by the Eleventh Circuit in 2000. After court enforcement, a compliance proceeding was held. The ALJ issued his compliance decision in April 2002—

before *Oil Capitol* had even been decided. The employer filed exceptions. On appeal, the Board remanded the case to the ALJ to apply *Oil Capitol*, *id.* at 33, and the Board subsequently denied the General Counsel's motion for reconsideration. (**Exhibit 8.**)

Application of *Oil Capitol* cannot be questioned. Here, unlike *Contractor Services*, the compliance proceedings are occurring after *Oil Capitol* became controlling Board law. *Id.*; see also *The McBurney Corp.*, 351 NLRB 799, 801 (2007), *recon. denied*, 352 NLRB 241 (three-member panel applied *Oil Capitol* to a case originally litigated in 1998 because “[t]he record shows that [two discriminatees] were salts, and thus *Oil Capitol* applies to them.”); *Flour Daniel, Inc.*, 353 NLRB No. 15, at *1 (2008).

The Region has also previously attempted to claim that all cases applying *Oil Capitol* retroactively were decided by two-member panels of the NLRB without authority. (**Exhibit 5.**) But that claim also missed the mark. For example, *Contractor Services* was decided by a three-member panel (Chairman Battista, Member Schaumber and Member Kirsanow). Likewise, in *The McBurney Corporation*, 351 NLRB 799, 801 (2007), a three-member panel ordered the retroactive application of *Oil Capitol* to two salt discriminatees. Both *Contractor Services* and *McBurney* remain good law that must be followed in this case.

3. The Region Cannot Change the Undisputed Facts; The Discriminatees are Salts.

Finally, in its July 2, 2013 letter, the Region attempts to ignore undisputed facts and to distort the definition of “salt” under Board law by now claiming that the discriminatees are not salts. (**Exhibit 6.**) This position must be rejected for several obvious reasons.

First, the admissions, facts, and prior findings conclusively establish that the discriminatees were part of the Union's salting campaign. These undisputed facts cannot be re-litigated 15 years after the fact simply because the Region does not like the impact that they have

on the amount of backpay available in compliance proceedings. These facts were never in dispute. The General Counsel filed no exceptions to these findings, and the Board affirmed without altering them. 29 C.F.R. § 102.46(g) (“No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding.”); *New Surfside Nursing Home*, 330 NLRB 1146, 1151 n.4 (2000) (“[M]atters not included in exceptions are deemed waived and may not thereafter be urged before the Board, or in any further proceeding. Therefore, Respondent is bound by the ALJ’s findings.”); *Flour Daniel, Inc.*, 353 NLRB No. 15 at *1 (The judge specifically ruled on the record “that the Board determined in the unfair labor practice case that the discriminatees were the equivalent of salts,” and the General Counsel was precluded from revisiting that issue at compliance.)

Second, the Region attempts to distort the facts and settled Board law by claiming that the individuals in this case “do not come close to fitting within the clear definition of salts provided by the Board in [] *Oil Capitol*” (**Exhibit 6** at p. 2) because they were not engaged in organizing efforts. In support of this misleading and incorrect claim, the Region selectively quotes only part of footnote 5 from the *Oil Capitol* decision as follows:

“Salting” has been defined as the act of a trade union in sending a union member or members to an unorganized jobsite to obtain employment and then organize the employees. *Tualatin Electric*, 312 NLRB 129, 130 fn. 3. Enfd. 84 F.3d 1202, 1203 fn. 1 (9th Cir. 1996)....“Salts” are those individuals, paid or unpaid, who apply for work with a nonunion employer in furtherance of a salting campaign.

(*Id.*)

This position ignores settled Board law recognizing that a salting campaign need not have organizing as its goal. Salts can be paid or unpaid and may have various agendas. As the omitted portion of the Board’s footnote 5 from *Oil Capitol* explains:

A salting campaign's immediate objective may not always be organizing. See, e.g. *Harman Brothers Heating & Air Conditioning v. NLRB*, 280 F.3d 1110, 1112 (7th Cir. 2002) (noting that true objective of union salting campaigns often is "to precipitate the commission of unfair labor practices by a startled employer," and *Starcon, Inc. v. NLRB*, 176 F.3d 948, 949 (7th Cir. 1999) (noting that salts' "proximate aim, in this case as commonly, is to precipitate an unfair labor practice proceeding that will result in heavy backpay costs to the employer")

(emphasis added).

Oil Capitol, 349 NLRB at n.5. The Board reiterated this point in *Toering Electric*, making clear again that "a salting campaign's immediate objective may not always be organizational." 351 NLRB 225, n.3 (2007); see also GC Memo OM 08-29 at p. 4 ("a salting campaign's immediate objective may not always be organizational").

There is no dispute that the Union engaged the discriminatees as "salts" to organize and to support the Union's strikes and other campaign tactics such as precipitating unfair labor practices to apply pressure and expose AMS to potential backpay liability.

The undisputed facts and undisputed procedural history in this matter also confirm that the Union was continuing its attempts to organize AMS, well after the 1991 settlement agreement was executed. The record is replete with uncontroverted testimony from Union organizer Dave Knapp and other salts that the Union was still engaged in a full scale organizing campaign. (See e.g., Tr. 95, 103, 107, 109, 191, 195, 211, 226, 307, 375, 406, 486, 499.) For example, Dave Knapp testified that the Union decided to end its "unfair labor practice strikes" against AMS on March 2, 1998 so that it could "commence organizing the shop." (Tr. 191 (emphasis added).)

In short, the Union continued its salting tactics at the same time that the parties disputed whether a 1991 settlement agreement created a Section 8(f) or Section 9(a) bargaining relationship. And despite decades of litigation, neither the Union nor the General Counsel has


ever submitted any proof that a majority of AMS's employees have ever designated the Union as their exclusive bargaining representative. The principal point of the Union's efforts was organizational, i.e. to secure Section 9(a) recognition, something that did not occur until well after the salting campaign and tactics at issue in this case.

IV. CONCLUSION

For all of the reasons discussed above, AMS requests that the Region's Amended Compliance Specification be dismissed in its entirety and requests an Order finding that AMS has no backpay liability to any of the discriminatees.

Attorneys for Respondent

Dated: February 13, 2015

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EXHIBIT 1

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

In the Matter of:

ALLIED MECHANICAL SERVICES,
INC.,

Respondent,

and

PLUMBERS And PIPEFITTERS, LOCAL
357, UNITED ASSOCIATION OF
JOURNEYMEN And APPRENTICES OF
THE PLUMBING And PIPEFITTING
INDUSTRY OF THE UNITED STATES
And CANADA, AFL-CIO,

Charging Party.

Case No. GR-7-CA-40907
GR-7-CA-41390

The above entitled matter came on for hearing pursuant to notice, before DAVID L. EVANS, Administrative Law Judge, at National Labor Relations Board, Region 7, 410 Michigan, Kalamazoo, Michigan, on June 30, 1999, at 11:00 a.m.

Argie Reporting Service
1000 West 70th Terrace
Kansas City, Missouri 64113
(816) 363-3657

1 MR. HOWELL: Can we go off-the-record?

2 JUDGE EVANS: Let's go off the record for a moment,
3 please.

4 (Off-the-record.)

5 JUDGE EVANS: Let's go back on the record.

6 Q. BY MR. HOWELL: I want to show you what has been marked
7 as General Counsel's Exhibit No. 28, and ask if you can tell me
8 what that is?

9 (General Counsel's Exhibit No. 28 marked for identification.)

10 A. Yes. It is a letter addressed to me in response to the
11 July 23rd letter that I sent to Allied Mechanical Services of
12 the notice of the unfair labor practice strike, sent to me by
13 the Company's attorney, Craig Miller.

14 Q. All right. Now, at the ---

15 MR. HOWELL: I am offering this, not for the truth of the
16 matter asserted, but as a response.

17 MR. BUDAY: We'll admit it, for the truth of the matter
18 asserted.

19 JUDGE EVANS: It is received for the communication.
20 Let's go on.

21 (General Counsel's Exhibit No. 28 received into evidence.)

22 MR. HOWELL: Okay.

23 Q. BY MR. HOWELL: Now, at the time that the strike
24 commenced, did the employees who had been returned to work on
25 July 9th, and went out again on strike on July 25th, had they

1 JUDGE EVANS: Let's go off the record for a moment,
2 please.

3 (Off-the-record.)

4 JUDGE EVANS: Let's go back on the record.

5 Q. BY MR. HOWELL: I am going to show you --- do you have in
6 front of you, General Counsel's Exhibit No. 31(a)?

7 (General Counsel's Exhibit No. 31(a) marked for identification.)

8 A. Yes.

9 Q. And can you tell me what that is?

10 A. Yes. This is a letter sent to John Huizinga from Allied
11 Mechanical Services, requesting information on new hires, dated
12 6-10-97.

13 Q. And who brought it to your attention that there may be
14 new hires?

15 A. Through my organizing efforts. I heard that through the
16 grapevine.

17 Q. Okay.

18 MR. HOWELL: I would offer General Counsel's Exhibit No.
19 31(a), pages 1, 2 and 3, which are --- 2 and 3 are the facts and
20 return receipts.

21 JUDGE EVANS: Objection?

22 MR. BUDAY: Relevancy.

23 JUDGE EVANS: Isn't it true his one of those you referred
24 to in the complaint?

25 MR. HOWELL: It is one of the issues of the outstanding

1 30(b) and 30(c). They are stapled together.

2 Can you tell me what each of those are?

3 (General Counsel's Exhibit No. 30(a), (b) and (c) marked for
4 identification.)

5 A. Yes. They are an unconditional offer to return to work
6 from the unfair labor practice strike, the first being March
7 2nd; the second being March 4th; and the third being March 25th,
8 1998.

9 Q. Okay.

10 MR. HOWELL: I would offer General Counsel's Exhibit No.
11 30(a), (b) and (c).

12 MR. BUDAY: No objection.

13 JUDGE EVANS: Received.

14 (General Counsel's Exhibit No. 30(a) through (c) received into
15 evidence.)

16 Q. BY MR. HOWELL: Now, prior to sending those letters, did
17 you have any conversation with the strikers listed therein?

18 A. Yes, I did.
19 A. Yes, I did.

19 Q. What did you tell them?

20 A. I told them --- we talked collectively. And we thought
21 that it would be the best --- an appropriate time to end our
22 strike, and to go back and to attempt to organize Allied
23 Mechanical Services.

24 Q. All right. And were those employees returned to work, or
25 offered return to work by Allied Mechanical Services?

1 Q. Now, when you mailed the applications, what kind --- what
2 kind of envelop did you use? What did it say?

3 A. It was an envelope from the UA. And I stamped the
4 corners with my UA organizer stamp. And then I sent it
5 certified mail to John Huizinga.

6 Q. And did you indicate anybody who had --- you know, other
7 than that UA on it, that indicated who was sending it?

8 A. Not that I recall. I was the only one that sent those.

9 Q. My question, and maybe you don't understand it, but did
10 you indicate anywhere on the face of the envelope, that you had
11 sent it?

12 A. Yeah. I stamped it.

13 Q. All right. And what does the stamp indicate?

14 A. Oh. It says, David Knapp, United Association Organizer.
15 And then it has the address of the local Union and the zip code
16 address.

17 Q. All right. Now, if --- take a look at your General
18 Counsel's Exhibit No. 3(b). You have a resume form. Do you see
19 that?

20 A. Yes.

21 Q. And who made up that form?

22 A. I did.

23 Q. Okay. Now, I noticed on your resume, and this is a
24 reference, Richard Frantz. Who, by the way, is Richard Frantz?

25 A. He is the business agent in Local 333, Battle Creek, and

1 also a part of the bargaining team with Allied Mechanical
2 Services.

3 Q. Okay. And ---

4 JUDGE EVANS: Excuse me. Where is Frantz mentioned?

5 Oh, it's a boilerplate. All right. Thank you.

6 Q. BY MR. HOWELL: And you said with Allied Mechanical
7 Services on whose behalf --- on whose bargaining team was he?

8 A. On the Union's side.

9 Q. You mean for bargaining with Allied Mechanical Services?

10 A. That's correct.

11 Q. Okay. And how long had Richard Frantz been on that ---
12 the Union bargaining team?

13 A. To the best of my knowledge, since 1991, I believe, at
14 the onset of the organizing, started negotiations and stuff.

15 Q. Now, the --- before sending these applications, ---
16 resumes, on behalf of the people listed on General Counsel's
17 Exhibit No. 3(a) and the corresponding documents, 3(b) through
18 24, did you have ---

19 How did they get the resumes?

20 JUDGE EVANS: Who get the resumes?

21 Q. BY MR. HOWELL: The applicants.

22 A. I gave them to them.

23 Q. And did you have any conversations with them before ---
24 and what did you tell --- what did you tell them about the ---

25 A. I asked the membership for help and assistance in

1 organizing the Allied Mechanical Services. And I asked anybody
2 that was willing to go to work for Allied Mechanical Services,
3 if they would fill out these resumes with the intention of going
4 to work for Allied Mechanical Services.

5 Q. And did they indicate whether or not they were willing to
6 go to work for Allied Mechanical Services?

7 A. Yes. They filled them out and told me that they would
8 be willing to go to work for them.

9 Q. All right. Now, I will note, if you will look down the
10 Exhibit list, 3(a), and if the corresponding application there
11 was sent over a period of time, about 3-31-1998 through August
12 5th, 1998?

13 A. That's correct.

14 Q. Okay. And the employees filled them out on various
15 dates?

16 A. Yes.

17 Q. Okay. And when did you send them, in relation to when
18 you got them?

19 A. Whenever I received them back from them, the individuals,
20 in person, or if they mailed them back to me, I sent them within
21 a day or so of the time that I received them.

22 MR. HOWELL: One moment, please.

23 (Long pause.)

24 Q. BY MR. HOWELL: If you would, I would like to have you
25 look at General Counsel's Exhibit No. 19. And if you could look

1 at General Counsel's Exhibit No. 19(a) and 19(b).

2 MR. BUDAY: I'm sorry, have those already been admitted?

3 JUDGE EVANS: Yes, that's the group ---

4 MR. BUDAY: Oh, okay. General Counsel's Exhibit No. 19,
5 you said?

6 MR. HOWELL: 19(a), I think, and 19(b).

7 Q. BY MR. HOWELL: If you would, if you could compare the
8 form, resume form from 19(a), it is different from the form in
9 19(b).

10 A. Yes.

11 Q. And who prepared the form used in 19(b)?

12 A. I did.

13 Q. Okay. And why did you change that?

14 A. Uh, I received information from the organizer from 174,
15 Muskegon, Kirk Stevenson, who had applied with Allied Mechanical
16 Services, some information that the Company was asking for
17 certification release consent form.

18 And so I just incorporated that into the application.

19 Q. All right. I want to show you General Counsel's Exhibit
20 No. 33 and ask you if you can tell me what that is?

21 (General Counsel's Exhibit No. 33 marked for identification.)

22 A. Yes. This was the correspondence that I was talking
23 about. The organizer from 174, Muskegon, Kirk Stevenson, sent
24 me the information that he received from Allied Mechanical
25 Services and the certification and release form. It was asked

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

In the Matter of:

ALLIED MECHANICAL SERVICES,
INC.,

Case No. GR-7-CA-40907
GR-7-CA-41390

Respondent,

and

PLUMBERS AND PIPEFITTERS, LOCAL
357, UNITED ASSOCIATION OF
JOURNEYMEN AND APPRENTICES OF
THE PLUMBING AND PIPEFITTING
INDUSTRY OF THE UNITED STATES
AND CANADA, AFL-CIO,

Charging Party.

The above entitled matter came on for further hearing,
pursuant to adjournment, before DAVID EVANS, Administrative Law
Judge, at the United States Federal Building, 410 E. Michigan,
Kalamazoo, Michigan, on July 1, 1999, at 9:15 A. M.

1 Q BY MR. BUDAY: All right. And paragraph 10 reads, I
2 quote: "The union decided to end the unfair labor practice
3 strike on or about March 2, 1998 since we felt it would be
4 appropriate to end up the ULP strike at that time to commence
5 organizing the shop."

6 A Yes.

7 Q Again, this is your affidavit from Case No. GR-7-CA-40907.

8 MR. HOWELL: Would you indicate the date?

9 Q BY MR. BUDAY: (continuing) Dated May 26th, 1998?

10 A Yes.

11 Q I'd like you to review paragraph 20, please. 19 and 20.

12 A Okay. I just finished with that paragraph.

13 Q Okay.

14 A Let me refresh my memory. Okay?

15 Q Yeah. Is that paragraph accurate?

16 A Yes. Yes. Yes.

17 Q And that paragraph reads: The union takes the position
18 that the employer's still violating the Act by its conduct in
19 not reinstating the Jim Bronkhurst, Ken Falk, Ted Fuller, Harold
20 Hill, Grant Maichele, Marty Hampton, Max Roggow, Brian Roden,
21 Steve Titus, Joel Kinney, John Kinney, and Robin Rees to work
22 from their ULP strike. These individuals are ready, willing,
23 and able to return to work. That's what it says, correct?

24 A Yes.

25 Q The same affidavit in GR-7-CA-40907, is that correct, the

1 A Yes.

2 Q First, I'd like to have you review paragraph 10 and tell
3 me whether that is accurate.

4 A Yes.

5 Q I'll read this into the record then. See if I'm doing it
6 properly. This item requests a copy of the safety training each
7 apprentice has received over the last five years. Usually the
8 company does not provide this info. It contends that it
9 provided the info. The union did go to the company and the
10 company did explain its training program, but it did not give
11 details as to the training each apprentice received. We were
12 again receiving this info because the employees may be referred
13 out by the union.

14 A Correct.

15 Q This is the same affidavit, paragraph 21, sub 9 on Page 8.
16 Will you review that, please? Is that accurate?

17 A Yes.

18 Q Again, I'd like to read it into the record then. I have
19 sent numerous applicants to the company to apply for work. I
20 have prepared a document with attachments, Exhibit L, which
21 lists the applicants that were sent to the company and the dates
22 they applied for work. Some of the applicants applied more than
23 once. I have noted each day that the employees applied for the
24 work on the exhibit. Correct, that's what it says?

25 A Yes.

1 Q And that's accurate, right?

2 A Yes.

3 Q Last I'd like you to read paragraph 21, sub-paragraph 11,
4 which goes from Page 8 to Page 9. Read that to yourself. Is
5 that statement accurate?

6 A Yes.

7 Q I'll read that into the record. I have heard the company
8 has started hiring around the first part of August, 1998. As I
9 understand, the company has hired new employees to work at a job
10 in the Grand Rapids area. I am under the impression that the
11 company has hired between four to eight employees. I am not
12 aware of the company having hired any employees between April,
13 1998 and August, 1998. I have also provided a release for some
14 of the applicants. When the union heard that the company was
15 wanting a release, we began to incorporate it with the resume
16 that we sent to the company. Is that accurate?

17 A Yes.

18 Q I'm handing or showing you an affidavit again, this time
19 in your handwriting, is that correct?

20 A No.

21 Q That's not your handwriting?

22 A No.

23 Q Well, let me identify it. An affidavit in Case GR-7-CA-
24 39213 and it has your name in there as being the affiant, the
25 person giving the affidavit. Is that correct?

1 A Correct.

2 Q Would you review that and see if that is, in fact, your
3 affidavit?

4 A Yes.

5 Q That is your affidavit?

6 A Yes.

7 Q The statements again contained in there are accurate?

8 A Yes.

9 Q I'd like to draw your attention specifically to Line 5
10 through Lines 8, that sentence, and ask you to review that.

11 A Which ones?

12 Q Line 5. You can read that line through to 8. There's --

13 A It's not mine, either. Okay.

14 Q That statement's accurate?

15 A Yes.

16 Q And the statement reads I sent the attached letter dated
17 September 16th, 1996 to AMS advising that John and Joel Kinney
18 and Tobin Rees are now organizing for the union.

19 A Correct.

20 Q Correct?

21 A Uh huh.

22 Q Direct your attention to that bundle of exhibits that
23 starts with G. C. Exhibit 3(a) and goes through G. C. Exhibit

24 24. Do you have that stack?

25 A (No oral response)

1 Q Okay. I just want to make sure were -- Were there
2 monthly meetings also for Local 337?

3 A Yes.

4 Q Were you in attendance at those meetings?

5 A The majority of them, yes.

6 Q And who attended those meetings? The other AMS employees.

7 A Oh, Kirk Wood. Mark Lemmer.

8 Q Can you recall anyone who was not a paid salt attending
9 those meetings?

10 MR. HOWELL: Objection.

11 JUDGE EVANS: Who was employed by AMS?

12 MR. BUDAY: Right.

13 THE WITNESS: That's employed by AMS?

14 JUDGE EVANS: Yes.

15 Q BY MR. BUDAY: (continuing) Right.

16 A Not off the top of my head, no.

17 Q The same with Local 357. Local 357, did they have monthly
18 meetings?

19 A They had informational meetings, at times.

20 Q And you attended those informational meetings?

21 A No.

22 Q In the packet of resumes, G. C. 3(a) through G. C. 24,
23 the, as I believe you testified yesterday, the envelopes in
24 which those resumes were mailed to AMS were stamped with you
25 return address, correct?

- 1 A Yes. To the best of my knowledge, yes.
- 2 Q And an example of that is found at 17 -- G. C. Exhibit
- 3 17(b)(2)?
- 4 A Yes.
- 5 Q Is that correct?
- 6 A Yes.
- 7 Q Why did you place that stamp on each of the -- on each
- 8 envelope?
- 9 A To let the employer know that it was coming from the union
- 10 and also, in case the mail somehow got screwed up, it would be
- 11 returned to the local union.
- 12 Q Okay. What is the significance of the employer knowing
- 13 that the materials were being mailed from David Knapp, UA
- 14 organizer?
- 15 A Because they were union applicants.
- 16 Q And why did you think that was important?
- 17 A That they were union applicants?
- 18 Q That the employer know that they were union applicants.
- 19 A No special reason.
- 20 Q I'd like you to direct your attention to G. C. Exhibit
- 21 30(a). Found it?
- 22 A Yes.
- 23 Q It's a letter dated March 2nd, 1998 from you to John
- 24 Huzinga, is that correct?
- 25 A Yes.

1 the ULP charges, their rights under the Act, if they decided
2 they wanted to strike, they could do so, and how that would
3 relate to the union's organizing activity, also. So that was
4 all kind of discussed and it was under the agreement whenever it
5 would be the most effective time for the union to -- to have a
6 strike. The employees and myself had the agreement that that
7 would be the best time for them to go out on strike and we were
8 all in agreement with it. So that's where it came to the term
9 of agreement.

10 Q Did you ever tell Mr. Kinney in relation to the December
11 23rd, 1996 strike that he had to go out on strike as part of his
12 duties as a salt?

13 A No.

14 Q What did you tell him with respect to the possibility of a
15 strike, if anything?

16 A I believe I told him there could be a strike and that it
17 was entirely up to him if he wanted to go on strike or not and
18 that's -- that's when he gave me the authority to strike on his
19 behalf and the notify him when the best time was to go on
20 strike.

21 Q Did you at any time prior to the December 23rd 1996 strike
22 tell Mr. Kinney that there would be any consequences adverse to
23 him if he chose not to go out on strike?

24 A No. Not at all.

25 Q With respect to Mr. Tobin Rees, were your discussions with

- 1 Q And did you have a good work record while you were there?
- 2 A Yes, I did.
- 3 Q Did you leave work voluntarily?
- 4 A Yes, I did.
- 5 Q I'm going to show you --
- 6 MR. HOWELL: Just one moment.
- 7 Q BY MR. HOWELL: (continuing) I'm going to show you what
- 8 has been marked as General Counsel's Exhibit 11. I'm sorry.
- 9 11, Page 1. Do you see that?
- 10 A Uh huh.
- 11 JUDGE EVANS: That was a yes. You have to say yes or no.
- 12 Q BY MR. HOWELL: Don't say uh huh. You've got to say yes
- 13 or no.
- 14 A Yes.
- 15 Q Okay. And can you tell me what that is?
- 16 A That is the resume for employment that I filled out.
- 17 Q Okay. And from whom did you get it?
- 18 A I got that from the union hall. Or during a meeting.
- 19 Q And who gave it to you, if you remember?
- 20 A Dave Knapp.
- 21 Q And, when you filled it out, did you understand what --
- 22 what was it for?
- 23 A Yes, I did. I understood.
- 24 Q And what was it for?
- 25 A It was for an organizing campaign towards Allied

1 that he would arrange another job for you, isn't that correct?

2 A Yes.

3 Q At the time you testified on September 15, 1997, you
4 testified that you had no present plans to return to AMS, is
5 that correct?

6 A Yes.

7 Q And that was a true statement?

8 A Yes.

9 Q You testified on September 15, 1997, that you were paid for
10 your testimony, paid to be there? Reimbursed is the word I
11 think used exactly?

12 A Yes, we were.

13 Q And today are you being reimbursed?

14 A Yes, we are. Well, I am anyway.

15 Q Is the reason that the strike was ended, according to you
16 on March 2nd, 1998, was because at that time it would be
17 appropriate to end the ULP strike and continue to try and
18 organize the shop?

19 A That is correct.

20 Q You indicated that before you went on strike on December
21 3rd, 1996, that you had telephone conversations with David
22 Knapp, is that correct?

23 A Before I went on strike?

24 Q Yes?

25 A Yes, I did.

BEFORE THE NATIONAL
LABOR RELATIONS BOARD

In the Matter of:

ALLIED MECHANICAL SERVICES,
INC.,

Respondent,

and

PLUMBERS AND PIPEFITTERS, LOCAL
357, UNITED ASSOCIATION OF
JOURNEYMEN AND APPRENTICES OF
THE PLUMBING AND PIPEFITTING
INDUSTRY OF THE UNITED STATES
AND CANADA, AFL-CIO,

Charging Party.

Case No. GR-7-CA-40907
GR-7-CA-41390

The above entitled matter came on for further hearing,
pursuant to adjournment, before **DAVID EVANS**, Administrative Law
Judge, at the United States Federal Building, 410 East Michigan,
Kalamazoo, Michigan, on Thursday, July 2, 1999 at 9:15 a.m.

ARGIE REPORTING SERVICE
1000 West 70th Terrace
Kansas City, MO 64113
816.363.3657

- 1 Q Stopped in his office to talk, correct?
- 2 A Yes.
- 3 Q Who brought up the topic of completing -- of filling out
- 4 the resumes?
- 5 A Dave Knapp.
- 6 Q And what did he tell you as to -- about the resumes?
- 7 A That it was an application for employment at Allied
- 8 Mechanical Services.
- 9 Q And did he tell you why he wanted you to complete one?
- 10 A To try to gain employment at Allied Mechanical Services.
- 11 Q Was anyone else present for this conversation?
- 12 A No.
- 13 Q Did Mr. Knapp mention anything about the resumes needed to
- 14 be completed as part of an organizing effort at AMS?
- 15 A Yes.
- 16 Q At the time you completed the resume, were you employed?
- 17 A I don't recall.
- 18 Q At the time you completed the resume in July of '98, were
- 19 you employed?
- 20 A Yes.
- 21 Q The resume -- is it true that the resume was sent to AMS by
- 22 the union?
- 23 A Yes.
- 24 Q And is it true that the return address on the envelope is
- 25 that of the union? The envelope in which your resume was sent?

1 in there to help organize the shop, if they were willing to take
2 me on.

3 JUDGE EVANS: All right. Next question.

4 Q BY MR. BUDAY: I would like to direct your attention to GC-
5 14(b).

6 A Yes.

7 Q Do you recall why you filled out another resume in April of
8 1998 with AMS? For AMS, I should say.

9 A Yes, for employment at AMS.

10 Q You had just completed one in earlier April. Why did you
11 complete one now in later April?

12 A Well, I believe the applications only stay for 30 days. I
13 don't know if that is correct.

14 Q Any other reason of which you are aware?

15 A Well, for employment at AMS.

16 Q And were you still employed at Diversified Mechanical on
17 April 28, 1998?

18 A Yes.

19 Q Still being paid the same wage of approximately \$19 to \$20
20 per hour?

21 A Yes.

22 Q I'm sorry. I forgot. Another resume. GC Exhibit 14(c),
23 please, if you would look at that?

24 A Yes.

25 Q Now at the top -- I guess that is page one -- that's okay.

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

In the Matter of:

ALLIED MECHANICAL SERVICES, INC.,

Respondent,

and

PLUMBERS & PIPEFITTERS LOCAL 357,
UNITED ASSOCIATION OF JOURNEYMEN &
APPRENTICES OF THE PLUMBING &
PIPEFITTING INDUSTRY OF THE UNITED
STATES AND CANADA, AFL-CIO,

Charging Party.

Case Nos. GR-7-CA-40907
GR-7-CA-41390

The above entitled matter came on for further hearing pursuant to adjournment, before DAVID EVANS, Administrative Law Judge, at the Federal Building, 410 Michigan, Kalamazoo, Michigan, on Monday, July 12, 1999, at 9:00 a.m.

- 1 A I filled this out and I had this faxed to the union hall.
- 2 Q Who at the union hall did you have it faxed to?
- 3 A To David Knapp.
- 4 Q And did he -- did you understand what he was going to do
- 5 with it?
- 6 A My understanding was that they were going to be sent to
- 7 Allied Mechanical Services.
- 8 Q And how did you come by that understanding, sir?
- 9 A At one of our meetings we discussed applying for work
- 10 there and this was one of our ways that we were going to do it.
- 11 Q And one of your meetings being a union meeting, you said
- 12 one of our meetings?
- 13 A It would -- technically it would be a organizational
- 14 meeting.
- 15 Q At the time you filled out this application, were you
- 16 willing to go to work for Allied Mechanical?
- 17 A Yes, sir.
- 18 Q Did you receive -- were you interviewed by Allied
- 19 Mechanical?
- 20 A No, sir.
- 21 Q Were you offered any employment by Allied Mechanical?
- 22 A No, sir.
- 23 MR. HOWELL: I have no more questions.
- 24 JUDGE EVANS: Union?
- 25 MS. PAPPAS: No, Your Honor.

1 Services in 1997, were you a paid union organizer, a salt?

2 A Yes.

3 Q And are you being paid to be here today?

4 A Yes.

5 Q By whom are you being paid?

6 A I believe I'm being paid by two people that's paying me,
7 plus the union.

8 Q And when you say union, meaning which one?

9 A Local 333.

10 Q Let me ask you several questions that you went on in July
11 of 1997. Can you identify that there was a meeting prior to
12 that?

13 A Yes, there was.

14 Q Okay. Was that meeting run by Dave Knapp?

15 A Yes, sir.

16 Q I'd like to hand you, Mr. Roggow a copy of a document
17 entitled questionnaire in Case No. GR-7-CA-40907. It has your
18 name on it. I'd like you to review that and tell me if that is
19 a questionnaire that you completed?

20 A Yes, it is.

21 Q And the date on that is June 2, 1998, is that correct?

22 A Yes, sir.

23 Q And who asked you to complete that questionnaire, if you
24 recall?

25 A I believe it was Dave Knapp.

- 1 back to work at AMS around that period of time?
- 2 A Yes.
- 3 Q And how did you become aware of it?
- 4 A We had another meeting after a union meeting.
- 5 Q And who was at the meeting, if you can recall?
- 6 A There was the members that went on strike with me and I
- 7 believe Dave Knapp was there.
- 8 Q And what do you recall being said at that meeting about
- 9 returning to work?
- 10 A He said he was going to -- Dave Knapp said he was going to
- 11 make an offer for us to return back to AMS and it was the right
- 12 thing to do for us to continue our organizing effort and we all
- 13 agreed that would be a smart move.
- 14 Q And were you willing to go back to work at Allied
- 15 Mechanical at the time?
- 16 A Yes.
- 17 Q And did they offer you your job back?
- 18 A No.
- 19 Q You should have in front of you General Counsel's Exhibit
- 20 18. Do you see that?
- 21 A Yep.
- 22 Q And can you tell me what that is, sir?
- 23 A That was an application I filled out for AMS.
- 24 Q And for AMS, you mean Allied Mechanical Services?
- 25 A Yeah.

1 be asking you a series of questions this afternoon and if you do
2 not understand my questions, please tell me. Okay.

3 JUDGE EVANS: You have to answer out loud.

4 THE WITNESS: Yes, sir.

5 Q BY MR. BUDAY: Okay. And if you fail to tell me that you
6 don't understand, we're going to presume that you understand the
7 question. Okay.

8 A Okay.

9 Q Mr. Falk, at the time you were employed by Allied
10 Mechanical Services in 1997, were you a paid union organizer or
11 what's referred to as a salt?

12 A Yes, sir.

13 Q And are you being paid today to be here?

14 A Yes, sir.

15 Q By whom are you being paid?

16 A I assume everybody. I mean, I'm being paid from them and
17 the union and you.

18 Q So you're getting a witness fee for being subpoenaed and
19 then union is also paying you, is that correct?

20 A Yes, sir.

21 Q Okay. And what union is paying you?

22 A Local 335.

23 Q Is it Local 333 now?

24 A Yes, sir.

25 Q Okay. You said you became an apprentice -- excuse me, you

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

In the Matter of:

ALLIED MECHANICAL SERVICES,
INC.,

Respondent,

and

PLUMBERS AND PIPEFITTERS, LOCAL
357, UNITED ASSOCIATION OF
JOURNEYMEN AND APPRENTICES OF
THE PLUMBING AND PIPEFITTING
INDUSTRY OF THE UNITED STATES
AND CANADA, AFL-CIO,

Charging Party.

Case No. GR-7-CA-40907
GR-7-CA-41390

The above entitled matter came on for further hearing,
pursuant to notice, before DAVID EVANS, Administrative Law
Judge, at the United States Federal Building, 410 East Michigan,
Kalamazoo, Michigan, on Tuesday, July 13, 1999, at 9:35 a.m.

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1000 West 70th Terrace
Kansas City, Missouri 64113
(816)-363-3657

1 Q And you were paid by the Union during that time period,
2 is that correct?

3 A Yes.

4 Q And likewise are you being paid for your time here today?

5 A No, not that I know of.

6 Q At the time that you were employed at Allied Mechanical
7 Services were you a paid Union Organizer which is referred to as
8 a salt?

9 A Yes.

10 MS. PAPPAS: He was employed at Allied Mechanical for a
11 long time, can we have a time frame that is relevant to this
12 case frame?

13 JUDGE EVANS: All right.

14 Q BY MR. BUDAY: In July of 1997, when you returned to work
15 were you a paid Union Organizer?

16 A Yes.

17 Q And you were what is referred to as a salt, correct?

18 A Yes.

19 JUDGE EVANS: Off the record for a moment.

20 (Off the record.)

21 JUDGE EVANS: On the record.

22 Q BY MR. BUDAY: You testified that at this point in time
23 when there was an offer made for you to return to work at Allied
24 Mechanical Services, do you recall when that was made?

25 A March, March of 1998, something like that.

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

In the Matter of:

ALLIED MECHANICAL SERVICES,
INC.,

Respondent,

and

PLUMBERS AND PIPEFITTERS, LOCAL
357, UNITED ASSOCIATION OF
JOURNEYMEN AND APPRENTICES OF
THE PLUMBING AND PIPEFITTING
INDUSTRY OF THE UNITED STATES
AND CANADA, AFL-CIO,

Charging Party.

Case No. GR-7-CA-40907
GR-7-CA-41390

The above entitled matter came on for further hearing,
pursuant to adjournment, before DAVID EVANS, Administrative Law
Judge, at the United States Federal Building, 410 E. Michigan,
Kalamazoo, Michigan, on July 15, 1999, at 9:10 A. M.

1 any relevance then to Respondent's Exhibit 8 and I reject it.

2 MR. BUDAY: Could that be placed in the rejected exhibits
3 file, please?

4 JUDGE EVANS: So ordered.

5 (Respondent Exhibit 8 rejected from evidence)

6 MR. BUDAY: Are we on Respondent's 31?

7 JUDGE EVANS: Yes.

8 (Respondent Exhibit 31 marked for identification)

9 Q BY MR. BUDAY: I hand you what's been marked as
10 Respondent's Exhibit 31. Could you identify that document for
11 the record, please?

12 A This is the court papers for Robert Eifler.

13 JUDGE EVANS: I'm sorry. What's that name again?

14 THE WITNESS: Robert Eifler.

15 JUDGE EVANS: E-i-f-l-e-r. Thank you.

16 Q BY MR. BUDAY: And this is a complaint filed in the United
17 States District Court of the Western Michigan -- the Western
18 District of Michigan, is that correct?

19 A That's what it says, yes.

20 Q And it was filed by who was the Plaintiff?

21 MS. PAPPAS: Objection. The document speaks for itself.

22 MR. BUDAY: The identity --

23 JUDGE EVANS: Well, we're just getting the identify of the
24 document, but it's filed by -- appears to be filed by Local 335,
25 Joint Apprenticeship Training Pro -- Fund.

1 THE WITNESS: Well, I didn't know if I --

2 JUDGE EVANS: All right. The answer is yes.

3 Q BY MR. BUDAY: It is the copy of the -- It is the
4 complaint? Okay.

5 MR. BUDAY: I'd move the admission of Respondent's Exhibit
6 31.

7 MR. HOWELL: I am going to object on the basis of
8 relevance. Whether or not they sued Mr. Eifler, I think, is
9 irrelevant. Also, I note that this contains as an attachment
10 what has been previously identified as Respondent's Exhibit 8, I
11 believe, which is a copy of -- of the various -- the scholarship
12 agreement. I assume it's the same one.

13 MR. BUDAY: Well, that was part of the complaint.

14 MR. HOWELL: Yeah. Well, I object. I don't see any
15 possible relevance.

16 JUDGE EVANS: All right. That's a relevance objection.
17 Ms. Pappas.

18 MS. PAPPAS: That same objection for the reasons that I
19 have articulated in response -- in my petition to revoke, as
20 well, Your Honor.

21 JUDGE EVANS: All right. How's the suit against Eifler --

22 MR. BUDAY: It's relevant. It shows the union has two
23 employees who leave and go work for AMS and continue to work for
24 AMS and sue them and that this is leverage.

25 JUDGE EVANS: All right. I reject the document.

1 MR. BUDAY: Call as a witness Dan Huizinga.

2 JUDGE EVANS: Mr. Huizinga, raise your right hand.

3 Whereupon,

4 DAN HUIZINGA

5 having been first duly sworn, was called as a witness herein and
6 was examined and testified as follows:

7 JUDGE EVANS: Be seated there, please.

8 DIRECT EXAMINATION

9 Q BY MR. BUDAY: Mr. Huizinga, could you state and spell
10 your name for the record, please?

11 A My full name is Daniel J. Huizinga. H-u-i-z-i-n-g-a.

12 Q By whom are you currently employed?

13 A I'm employed by Allied Mechanical Services, Inc.

14 Q In what capacity?

15 A I'm the treasurer of Allied Mechanical Services.

16 Q And how long have you been employed by Allied Mechanical
17 Services?

18 A I've been employed with Allied since its beginning in
19 October of 1995.

20 Q In your role as treasurer, are you familiar with Allied
21 Mechanical Services' relationship with UAW Local 337?

22 A Yes, I am.

23 Q Did there become a time when AMS joined the local
24 Mechanical Contractors Association?

25 A yes. When Allied Mechanical was formed in 1985 and

EXHIBIT 2

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SEVEN

ALLIED MECHANICAL SERVICES, INC.,

Respondent,

and

Case Nos. 07-CA-040907
07-CA-041390

LOCAL 357, UNITED ASSOCIATION OF
JOURNEYMEN AND APPRENTICES OF THE
PLUMBING AND PIPE FITTING INDUSTRY
OF THE UNITED STATES AND CANADA, AFL-CIO,

Charging Union.

**RESPONDENT'S ANSWER TO "AMENDED COMPLIANCE SPECIFICATION AND
NOTICE OF HEARING" AND AFFIRMATIVE AND OTHER DEFENSES**

**Respondent Allied Mechanical Services, Inc. ("AMS") by its attorneys,
Miller Johnson, answers the Amended Compliance Specification in these cases as follows:**

As a controversy presently exists regarding the liability of Respondent as to the amount of backpay due under the terms of the Board's Orders, as enforced by the United States Court of Appeals for the District of Columbia Circuit, the undersigned, pursuant to the authority conferred by the Board, issues this Compliance Specification and Notice of Hearing and alleges that the backpay due is as follows:

ANSWER: AMS admits that a controversy regarding backpay amounts due under the Board's Order presently exists.

In further answer, the Region's allegations remain premature, incomplete and incorrect. They are based on a defective compliance specification, on an unreasonable and arbitrary method for determining backpay, and on a legally flawed and incomplete investigation.

For example, the Region has:

- (a) failed to comply with the NLRB's Rules and Casehandling Manual requirements for investigating backpay matters;**
- (b) failed to provide AMS with full information on backpay amounts;**

(c) failed to explain the proposed methods for calculating backpay before issuing the original or amended specification in these cases;

(d) failed to provide AMS with an explanation and full records supporting the backpay allegations as required by Section 10650.5 of the Board's Compliance Manual;

(e) failed to take reasonable steps to preserve and secure all relevant interim earnings information from all available sources concerning the discriminatees, which will reduce significantly or eliminate much if not all of the backpay amounts now alleged;

(f) failed to provide Respondent with full and complete detailed Social Security Administration reports showing earnings for each discriminatee (the Region has provided such detailed reports for only some of the individuals and attempts to rely on unsupported and unverified documents to establish the alleged interim earnings for others); and

(g) refused to apply controlling law, including but not limited to the rules governing backpay liability in union salting cases under *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (2007) and *Contractor Services, Inc.* 351 NLRB 33 (2007).

The Board has consistently applied *Oil Capitol Sheet Metal* retroactively, *see, e.g., Flour Daniel, Inc.*, 353 NLRB No. 15 (2008); *McBurney Corp.*, 352 NLRB 241, 242 (2008); *Contractor Servs.*, 351 NLRB No. 4 (2007). Nevertheless, to AMS's knowledge, the Region has not conducted any investigation regarding the salting campaign by the admitted salts in these cases as required by *Oil Capitol Sheet Metal*. As such, the Region and General Counsel cannot meet their burden to prove that each of the discriminatees/salts was entitled to reinstatement/instatement or would have worked the entire backpay periods alleged.

Since April 2012, AMS has fully cooperated and provided payroll information requested by the Region for its backpay investigation, including the identification of comparable employees based on each individual's specific circumstances, such as whether the comparable employee(s) had similar hire dates, skills, qualifications, experience, earnings, work hours and history.

On May 31, 2013, the Region issued an initial, admittedly incomplete, flawed Compliance Specification. That specification was not predicated on any interim earnings information, and falsely alleged that Respondent owed \$2,333,789.78 in backpay. Respondent AMS was required to answer that defective Specification, and did so on July 12, 2013, pointing out multiple legal and factual flaws, and again requesting full and complete responses to its repeated requests for full information upon which the alleged backpay amounts were based. The Region acknowledged that the Specification was incomplete and needed to be amended to reflect interim earnings information.

On November 7, 2014, despite the Region's continuing failure to provide complete information, the Region issued an Amended Compliance specification reducing the total net backpay alleged to \$613,265.01. Although drastically lower, these newly alleged amounts continue to suffer from multiple, fundamental defects. In short, the Amended Compliance Specification is still based on inaccurate and incorrect information, still based on an unexplained and flawed methodology, still fails to account for controlling Board law, and still includes multiple errors. For instance, the Region continues to ignore controlling Board law and refuses to apply *Oil Capitol Sheet Metal*. And with respect to the Region's gross backpay calculations, the Amended Specification is no different from the initial Specification. It still contains the same types of errors which have unnecessarily and artificially inflated the amount of gross backpay at issue in this case. The Amended Specification also contains mathematical errors and factual inaccuracies with respect to the interim earnings that the Region has applied to offset the defective gross backpay amounts.

The Region's failure to provide AMS with full and complete information renders the Amended Specification premature and unfairly prejudices AMS. It also prevents AMS from providing a full and complete answer.

The Region's reliance on inaccurate factual information, inapplicable legal theories and defective mathematical computations have grossly inflated the backpay still at issue in this case. However, even assuming *arguendo* that the Region's specified backpay periods could be established as though the discriminatees were not admitted salts, that the interim earnings information was complete, verifiable and accurate, and even if the Region's calculations were correct and support by the facts (which they are not) there would still be less than \$72,000.00 at issue. (See Attachment 1.)¹

1. The amount of backpay due in this matter is the amount of earnings the above-named discriminatees would have received, but for the Respondent's unfair labor practices.

ANSWER: The allegations in paragraph 1 call for a legal conclusion and thus no answer is required. Should an answer be required, the allegation is denied.

In further answer, the amount of any backpay owed to discriminatees by Respondent is the "net backpay" which is gross backpay (calculated on a lawful and reasonable basis) less interim earnings supported by evidence. The Amended Specification fails to adopt a lawful and reasonable methodology for calculating gross backpay. The Amended Specification also includes inaccurate, incomplete, or unreasonable interim earnings calculations to reduce the gross backpay allegedly owed. It further fails to account for the discriminatees' failure to mitigate and the General Counsel's failure to follow controlling Board law. The General Counsel cannot meet its burdens under *Oil Capitol Sheet Metal*, 349 NLRB No. 118 (2007) because no investigation concerning the salting campaign was

¹ AMS has repeatedly asked to meet with the Region to discuss and resolve the parties' differences regarding the calculations and to attempt to settle all remaining compliance issues. AMS remains willing to do so in hopes that the parties can avoid the need for formal compliance litigation.

conducted, and none of the union salts/discriminatees in this case would have returned to work or worked the entire backpay periods alleged.

2. No payments have been made by Respondent to satisfy the obligation of Respondent under the terms of the above-noted Board Orders.

ANSWER: Admitted only that no payments have been made directly to the discriminatees. All remaining allegations are denied.

3. The overall backpay period began about March 2, 1998, and continues for the various discriminatees until they have been offered immediate and full employment. Individual discriminatee backpay periods vary as described below, depending on when Respondent offered full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and/or offered them instatement/employment.

ANSWER: Admitted that AMS made full and unconditional offers of reinstatement or instatement to all discriminatees except for Harold Hill and Scott Calhoun (deceased). All remaining allegations are denied.

In further answer, all of the discriminatees were salts who are not entitled to reinstatement or instatement, or any backpay. Any alleged backpay periods must be significantly limited under the legal principles adopted by the Board in *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (2007) and *Contractor Services, Inc.*, 351 NLRB 33 (2007).

Each discriminatee was a salt. This fact is supported by Board findings and undisputed record evidence including admissions, testimony, and pleadings. For example, in concluding that AMS improperly failed to reinstate striking employees, there was no dispute that all of the discriminatees were salts. All were paid by the union in connection with its salting campaign, all were subject to the union's control, and all had agreements to go on strike (and to return) whenever the union told them to do so. *Allied Mechanical Services*, 341 NLRB 1084, 1095 (2004). On these facts, the ALJ found it "undisputed that all of the ten unreinstated strikers, were at the time that they went on strike, being paid by Local 337 (or one of the other Michigan UA locals) to assist in organizing the Respondent's employees and were therefore 'salts,' as that term is commonly used in labor relations law." *Id.* at 1095. Later in his decision, which was affirmed by the Board, the ALJ reiterated his conclusion that all ten strikers were "salts," stating: "It is true that the 10 strikers were paid, and paid well, to be salts." *Id.* at 1101 (emphasis added); *Allied Mechanical Servs.*, 320 NLRB 32, 36-37 (1995).

The General Counsel cannot meet his burden to establish that any of the discriminatees were entitled to reinstatement/instatement or that they would have worked during any of the backpay periods alleged. Thus, the Amended Specification should be dismissed. Alternatively, any alleged backpay periods for these salts cannot exceed six months. AMS also incorporates its answers to the allegations in paragraphs 5 and 7 *infra*.

4. An appropriate measure of backpay due the discriminatees, who are named below, is the amount of earnings that they would have received, but for the unlawful discrimination against them:

Jim Bronkhorst	Max Roggow
Ken Falk	Brian Rowden
Ted Fuller	Steve Titus
Jon Kinney	Scott Calhoun
Grant Maichele	Harold Hill
Marty Preston	Terri Jo Conroy
Tobin Rees	Jeff Kiss

ANSWER: The allegations in paragraph 4 call for a legal conclusion and thus no answer is required. Should an answer be required, the allegations are denied.

In further answer, the phrase "amount of earnings" is not explained or defined. The Board's Orders will speak for themselves and any backpay amounts owed to a discriminatee by Respondent is generally the "net backpay" which includes gross backpay determined on a lawful, reasonable basis less interim earnings and subject to other offsets such as those based on a failure to mitigate damages. As will be demonstrated at hearing, in this answer, and in AMS's alternative calculations, the Amended Specification is based on incorrect and inaccurate information, is based on flawed, unreasonable, and arbitrary methods for calculating gross backpay and/or interim earnings, fails to account for controlling legal principles concerning discriminatees who were union salts, includes mathematical errors, and makes incorrect and unsupported factual assumptions concerning average hours worked, wage rates, average wage increases, and interim earnings during the alleged backpay periods.

The Amended Specification also fails to account for the discriminatees' failure(s) to mitigate.

5. (a) The backpay period for discriminatee Jim Bronkhorst commenced about March 2, 1998, and continued until he was offered reinstatement about May 30, 2001.

ANSWER: Admitted that the backpay period for Jim Bronkhorst commenced about March 2, 1998 and that AMS offered Mr. Bronkhorst full and unconditional reinstatement on about May 30, 2001. The remaining allegations are denied.

In further answer, Mr. Bronkhorst was a salt. The General Counsel cannot establish, as is his burden under *Oil Capitol Sheet Metal, Inc.*, that Mr. Bronkhorst was entitled to reinstatement or any backpay. Further, any alleged backpay period for Mr. Bronkhorst could not exceed six months. There is no evidence to support a claim that he would have continued working for AMS.

In the alternative, if *Oil Capitol Sheet Metal, Inc.* did not apply (which it does), Respondent agrees that Mr. Bronkhorst's backpay period would end on May 30, 2001.

(b) The backpay period for discriminatee Ken Falk commenced about March 2, 1998, and continued until he was offered reinstatement about November 14, 2001.

ANSWER: Admitted that the backpay period for Ken Falk commenced about March 2, 1998, that AMS offered Mr. Falk full and unconditional reinstatement on November 2, 2001, and that Mr. Falk returned to work on November 14, 2001. The remaining allegations are denied.

In further answer, Mr. Falk was a salt and the General Counsel cannot establish, as is his burden under *Oil Capitol Sheet Metal, Inc.*, that Mr. Falk was entitled to reinstatement or any backpay. Further, any alleged backpay period for Mr. Falk could not exceed six months. There is no evidence to support a claim that he would have continued working for AMS.

In the alternative, if *Oil Capitol Sheet Metal, Inc.* did not apply (which it does), Respondent agrees that Mr. Falk's backpay period would end on November 14, 2001.

(c) The backpay period for discriminatee Ted Fuller commenced about March 2, 1998, and continued until he was offered reinstatement about September 22, 1999.

ANSWER: Admitted that the backpay period for Ted Fuller commenced about March 2, 1998, that AMS offered Mr. Fuller full and unconditional reinstatement on September 15, 1999, and that Mr. Fuller returned to work on September 22, 1999. The remaining allegations are denied.

In further answer, Mr. Fuller was a salt and the General Counsel cannot establish, as is his burden under *Oil Capitol Sheet Metal, Inc.*, that Mr. Fuller was entitled to reinstatement or any backpay. Further, any alleged backpay period for Mr. Fuller could not exceed six months. There is no evidence to support a claim that he would have continued working for AMS.

In the alternative, if *Oil Capitol Sheet Metal, Inc.* did not apply (which it does), Respondent agrees that Mr. Fuller's backpay period would end on September 22, 1999.

(d) The backpay period for discriminatee Jon Kinney commenced about March 2, 1998, and continued until he was offered reinstatement about August 12, 2002.

ANSWER: Admitted that the backpay period for Jon Kinney commenced about March 2, 1998, and that AMS offered Mr. Kinney full and unconditional reinstatement on or about August 12, 2002. The remaining allegations are denied.

In further answer, Mr. Kinney was a salt and the General Counsel cannot establish, as is his burden under *Oil Capitol Sheet Metal, Inc.*, that Mr. Kinney was entitled to reinstatement or any backpay. Further, any alleged backpay period for Mr. Kinney could not exceed six months. There is no evidence to support a claim that he would have continued working for AMS.

In the alternative, if *Oil Capitol Sheet Metal, Inc.* did not apply (which it does), Respondent agrees that Mr. Kinney's backpay period would end on August 12, 2002.

(e) The backpay period for discriminatee Grant Maichele commenced about March 2, 1998, and continued until he was offered reinstatement about July 12, 2001.

ANSWER: Admitted that the backpay period for Grant Maichele commenced about March 2, 1998, that AMS offered Mr. Maichele full and unconditional reinstatement, and that Mr. Maichele returned to work on July 12, 2001. The remaining allegations are denied.

In further answer, Mr. Maichele was a salt and the General Counsel cannot establish, as is his burden under *Oil Capitol Sheet Metal, Inc.*, that Mr. Maichele was entitled to reinstatement or any backpay. Further, any alleged backpay period for Mr. Maichele could not exceed six months. There is no evidence to support a claim that he would have continued working for AMS.

In the alternative, if *Oil Capitol Sheet Metal, Inc.* did not apply (which it does), Respondent agrees that Mr. Maichele's backpay period would end on July 12, 2001.

(f) The backpay period for discriminatee Marty Preston commenced about March 2, 1998, and continued until he was offered reinstatement about December 17, 2001.

ANSWER: Admitted that the backpay period for Marty Preston commenced about March 2, 1998, that AMS offered Mr. Preston full and unconditional reinstatement, and that he returned to work on about December 17, 2001. The remaining allegations are denied.

In further answer, Mr. Preston was a salt and the General Counsel cannot establish, as is his burden under *Oil Capitol Sheet Metal, Inc.*, that Mr. Preston was entitled to reinstatement or any backpay. Further, any alleged backpay period for Mr. Preston could not exceed six months. There is no evidence to support a claim that he would have continued working for AMS.

In the alternative, if *Oil Capitol Sheet Metal, Inc.* did not apply (which it does), Respondent agrees that Mr. Preston's backpay period would end on December 17, 2001.

(g) The backpay period for discriminatee Tobin Rees commenced about March 2, 1998, and continued until he was offered reinstatement about March 25, 2002.

ANSWER: Admitted that the backpay period for Tobin Rees commenced about March 2, 1998, and that AMS offered Mr. Rees full and unconditional reinstatement on about March 25, 2002. The remaining allegations are denied.

In further answer, Mr. Rees was a salt and the General Counsel cannot establish, as is his burden under *Oil Capitol Sheet Metal, Inc.*, that Mr. Rees was entitled to reinstatement or any backpay. Further, any alleged backpay period for Mr. Rees could not

exceed six months. There is no evidence to support a claim that he would have continued working for AMS.

In the alternative, if *Oil Capitol Sheet Metal, Inc.* did not apply (which it does), Respondent agrees that Mr. Rees's backpay period would end on March 25, 2002. Mr. Rees is deceased.

(h) The backpay period for discriminatee Max Roggow commenced about March 2, 1998, and continued until he was offered reinstatement about December 17, 2001.

ANSWER: Admitted that the backpay period for Max Roggow commenced about March 2, 1998, and that AMS offered Mr. Roggow full and unconditional reinstatement on about December 17, 2001. The remaining allegations are denied.

In further answer, Mr. Roggow was a salt and the General Counsel cannot establish, as is his burden under *Oil Capitol Sheet Metal, Inc.*, that Mr. Roggow was entitled to reinstatement or any backpay. Further, any alleged backpay period for Mr. Roggow could not exceed six months. There is no evidence to support a claim that he would have continued working for AMS.

In the alternative, if *Oil Capitol Sheet Metal, Inc.* did not apply (which it does), Respondent agrees that Mr. Roggow's backpay period would end on December 17, 2001.

(i) The backpay period for discriminatee Brian Rowden commenced about March 2, 1998, and continued until he was offered reinstatement about September 22, 1999.

ANSWER: Admitted that the backpay period for Brian Rowden commenced about March 2, 1998, and that AMS offered Mr. Rowden full and unconditional reinstatement on about September 22, 1999. The remaining allegations are denied.

In further answer, Mr. Rowden was a salt and the General Counsel cannot establish, as is his burden under *Oil Capitol Sheet Metal, Inc.*, that Mr. Rowden was entitled to reinstatement or any backpay. Further, any alleged backpay period for Mr. Rowden could not exceed six months. There is no evidence to support a claim that he would have continued working for AMS.

In the alternative, if *Oil Capitol Sheet Metal, Inc.* did not apply (which it does), Respondent agrees that Mr. Rowden's backpay period would end on September 22, 1999.

(j) The backpay period for discriminatee Steve Titus commenced about March 2, 1998, and continued until he was offered reinstatement about June 14, 2001.

ANSWER: Admitted that the backpay period for Steve Titus commenced about March 2, 1998, and that AMS offered Mr. Titus full and unconditional reinstatement on about June 14, 2001. The remaining allegations are denied.

In further answer, Mr. Titus was a salt and the General Counsel cannot establish, as is his burden under *Oil Capitol Sheet Metal, Inc.*, that Mr. Titus was entitled to

reinstatement or any backpay. Further, any alleged backpay period for Mr. Titus could not exceed six months. There is no evidence to support a claim that he would have continued working for AMS.

In the alternative, if *Oil Capitol Sheet Metal, Inc.* did not apply (which it does), Respondent agrees that Mr. Titus's backpay period would end on June 14, 2001. Mr. Titus is deceased.

(k) The backpay period for discriminatee Scott Calhoun commenced about August 5, 1998, and continued until December 31, 2009, when it is believed he no longer actively sought employment. Scott Calhoun passed away on July 25, 2011.

ANSWER: Admitted that the backpay period for Scott Calhoun commenced about August 5, 1998, and that Mr. Calhoun no longer actively sought employment during the alleged backpay period, and, upon information and belief, that Mr. Calhoun died on July 25, 2011. The remaining allegations are denied.

In further answer, Mr. Calhoun was a salt and the General Counsel cannot establish, as is his burden under *Oil Capitol Sheet Metal, Inc.*, that Mr. Calhoun was entitled to instatement or that any backpay period exists or could exceed six months.

In the alternative, if *Oil Capitol Sheet Metal, Inc.* did not apply (which it does) Respondent agrees that Mr. Calhoun's backpay period would end no later than December 31, 2009 when he allegedly no longer actively sought employment. Respondent believes that additional facts will demonstrate that Mr. Calhoun was unable to work or otherwise left the workforce sooner than December 31, 2009.

(l) The backpay period for discriminatee Harold Hill commenced about August 5, 1998, and is ongoing until he is offered instatement.

ANSWER: Admitted that the backpay period for Harold Hill commenced about August 5, 1998. The remaining allegations are denied.

In further answer, Mr. Hill was a salt and the General Counsel cannot establish, as is his burden under *Oil Capitol Sheet Metal, Inc.*, that Mr. Hill was entitled to instatement or that any backpay period exists or could exceed six months.

(m) The backpay period for discriminatee Terri Jo Conroy commenced about August 5, 1998, and continued until she retired and began collecting Social Security disability benefits on about November 1, 2010.

ANSWER: Admitted that the backpay period for Terri Jo Conroy commenced about August 5, 1998. Respondent is without sufficient information to admit or deny the allegation that Ms. Conroy retired and began collecting Social Security disability benefits on or before November 1, 2010. The remaining allegations are denied.

In further answer, Ms. Conroy was a salt and the General Counsel cannot establish, as is his burden under *Oil Capitol Sheet Metal, Inc.*, that Ms. Conroy was entitled to reinstatement or that any backpay period exists or could exceed six months.

In the alternative, if *Oil Capitol Sheet Metal, Inc.* did not apply (which it does) Ms. Conroy's backpay period would end no later than November 1, 2010 when she allegedly retired and began collecting Social Security disability benefits. Respondent, however, believes that the facts and evidence will show that Ms. Conroy was not a plumber/pipefitter and thus removed herself from the relevant work force well before November 1, 2010.

(n) The backpay period for discriminatee Jeff Kiss commenced about August 5, 1998, and continued until he was offered reinstatement about November 26, 2001.

ANSWER: Admitted that the backpay period for Jeff Kiss commenced about August 5, 1998, that AMS offered Mr. Kiss full and unconditional reinstatement on November 14, 2001, and that Mr. Kiss returned to work on November 26, 2001. The remaining allegations are denied.

In further answer, Mr. Kiss was a salt and the General Counsel cannot establish, as is his burden under *Oil Capitol Sheet Metal, Inc.*, that Mr. Kiss was entitled to reinstatement or any backpay. Further, any alleged backpay period for Mr. Kiss could not exceed six months. There is no evidence to support a claim that he would have continued working for AMS.

In the alternative, if *Oil Capitol Sheet Metal, Inc.* did not apply (which it does), Respondent agrees that Mr. Kiss's backpay period would end on November 26, 2001.

6. (a) An appropriate measure of gross backpay can be obtained by determining the number of hours customarily worked by similarly classified employees (plumbers and pipe fitters) employed by Respondent during the period beginning about March 2, 1998, and continuing to date, averaged into weekly pay periods during each calendar quarter and multiplied by the relevant hourly wage rate for each discriminatee, and by the hourly wage rate times 1.5 for overtime hours, where applicable.

ANSWER: The allegations in paragraph 6(a) call for a legal conclusion and thus no answer is required. Should an answer be required, the allegations are denied.

In further answer, Respondent acknowledges that an appropriate method for determining gross backpay may include the use of average hours/earnings for all members of a group of appropriately selected comparable employees during the applicable backpay period. (See Compliance Manual Section 10540, Formula 2.) AMS denies that the Amended Specification and Attachments fairly or accurately apply this method.

The Amended Specification and its supporting calculations adopt an unreasonable and arbitrary method for determining average regular and overtime hours worked among the identified comparable employees. For instance, the Specification adopts five comparable employees for several individuals but then arbitrarily ignores relevant

data and information for those comparable on a week by week basis without any rational basis or explanation.

The Amended Specification also fails to apply the known 1998 wage rates as the appropriate starting rate for the alleged backpay periods, and fails to accurately approximate the average yearly wage increases. The Amended Specification further fails to use the correct wage rates and ignores that several of the discriminatees were apprentices who applied for apprentice positions.

The Amended Specification's allegations and unexplained calculations artificially inflate gross backpay and arbitrarily manipulate and alter the settled group of comparable employees on a weekly basis. The Specification repeatedly ignores the payroll records and the relevant work history for each group of comparable employees that the Region selected and identified. It fails to calculate average hours or earnings correctly or in a reasonable manner to fairly approximate average earnings under the method looking to comparable employees. Under this method, the Region must account for normal and ordinary fluctuations, ordinary absenteeism, shifting workloads and the variable amount of hours of a selected group of comparable employees during the alleged period. The Specification fails to do so, and grossly overstates the gross backpay amounts at issue.

The following is an example of a weekly calculation used for discriminatees Bronkhorst, Falk, Fuller, Kinney, Kiss, Maichele, Preston, Rees, Roggow, Rowden and Titus for the week of 1/16/1999.

NLRB's Comparable Employees	Actual Regular Hours for the Week of 1/16/99	Actual OT Hours for the Week of 1/16/99
Jeudevine	40	20.5
Flannigan	0	0
Dazell	40	0
Holwerda	40	14
Clysdale	40	0
The Region's incorrect claimed "average" used for the discriminates	40	17.25
Actual Mathematical Average	32	6.9

By incorrectly calculating the average number of regular hours and overtime hours within this particular week, the Region incorrectly assigned 88 extra hours of regular time and 113.85 extra hours of overtime during this single week. This single error resulted in a gross backpay overstatement of \$4,249.54.

Such artificial inflation of gross backpay by manipulating the average numbers arbitrarily occurs throughout the Region's calculations and is not permitted under Board law. *E.g., The Painting Co.*, 351 NLRB 42 (2007).

The use of the hourly average hours/earnings and the average hourly wage rate among the selected comparable employees would only be a reasonable, appropriate and lawful method for determining gross backpay if it is based on the accurate average hours and wage increase calculations. In further answer, AMS incorporates its answers to paragraph 7 *infra*.

(b) Quarterly interim earnings, whenever obtained, are deducted from gross backpay in order to obtain net backpay. In accordance with longstanding Board policy, the only quarters included are those in which there was greater gross backpay than there were interim earnings. In quarters where interim earnings are greater than gross backpay, the quarterly net backpay is deemed to be zero and such quarters are therefore not included in the total calculations which comprise overall net backpay.

ANSWER: The allegations in paragraph 6(b) call for a legal conclusion and thus no answer is required. Should an answer be required, it is admitted that quarterly interim earnings must be deducted from gross backpay to determine net backpay. AMS denies that the Region has properly calculated gross or net backpay or applied consistently a reasonable and legally acceptable method for determining gross or net backpay.

(c) Interim earnings are deducted from the gross backpay to yield the net backpay owed to each discriminatee.

ANSWER: The allegations in paragraph 6(c) call for a legal conclusion and thus no answer is required. Should an answer be required, it is admitted that interim earnings, once they have been totaled accurately, must be deducted from gross backpay to yield the net backpay owed to each discriminatee, if any is owed after interim earnings are deducted.

7. (a) The hours, which can reasonably be estimated that discriminatee Jim Bronkhorst would have worked, and his rate of pay are denoted in Schedule A. Based upon this, during his backpay period of about March 2, 1998, to about May 30, 2001, Bronkhorst would have received net backpay of \$11,964.66, after the deduction of interim earnings. Accordingly, as there were no interim expenses or medical expenses, the total net backpay and expenses due Bronkhorst is \$11,964.66 (see Schedule A).

ANSWER: Admitted that there were no interim expenses or medical expenses for inclusion in backpay allegedly due. The remaining allegations are denied. The net backpay for Mr. Bronkhorst is not \$11,964.66, it is \$0.00. (See Attachment 1A.)

In further answer, the Region has failed to explain its methodology to AMS, and its calculations are based on unreasonable and arbitrary actions. The Region's calculations are also mathematically wrong, and fail to represent an accurate measure of gross or net backpay. Among the errors and objections to the Region's calculations set forth in Schedule A are the following:

- The Region's calculations are based on the incorrect backpay period. Mr. Bronkhorst was a salt who is not entitled to reinstatement or any backpay. *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (2007).**

- Thus, any alleged backpay period must be limited to no more than six months. *E.g., Jeffs Electric, LLC*, 2007 WL 2735680 (Sep. 17, 2007).
- The Region failed to conduct an appropriate investigation on the salting period, the General Counsel cannot carry its burden under *Oil Capitol Sheet Metal*, and the Specification must be dismissed.
- Mr. Bronkhorst has failed to mitigate his alleged backpay damages, was unavailable for work, or improperly limited his efforts to find work during the alleged backpay periods.
- The Region has incorrectly calculated average hours, average OT hours, and average earnings for the identified comparable employees. Having selected the group of comparable employees for determining gross backpay based on average hours or earnings, the Region must use the correct calculations for average hours and wages as set forth by AMS in Attachment 1A.
- The Region cannot ignore ordinary fluctuations in hours, earnings, and wages among the group of comparable employees that it has identified. Doing so is not a reasonable estimate of gross backpay. *E.g., The Painting Co.*, 351 NLRB 42 (2007).
- The Region's calculations are based on erroneous wage rates for discriminatees and fail to apply the correct starting wage rates applicable in 1998.
- No payroll records support an alleged \$4.00 per hour average raise for 1998 or other yearly raises as alleged, and the Region simply ignores the known, applicable wage rate for Mr. Bronkhorst for 1998.
- There is no evidence that Mr. Bronkhorst has been contacted or identified because the Region has refused to supply AMS with requested information. As a potential missing discriminatee, the calculation of backpay raises significant legal and policy issues and these allegations should be dismissed. *The Painting Co., supra*.
- Mr. Bronkhorst has willfully concealed or refused to cooperate in providing relevant interim earnings information.

Mr. Bronkhorst is not entitled to any backpay. But even if he was, the Region's calculations are fundamentally flawed. AMS provides the reasonable and correct backpay calculations assuming a six-month backpay period. It also includes alternative calculations using the Region's alleged backpay periods. (Attachment 1A.) Under either scenario, no net backpay is due.

Respondent's calculations are based on payroll records as provided to the Region, use the average hours of the appropriate comparable employees, and use the correct starting wage in 1998, as well as the correct average wage increases among the identified comparable employees under this method. These gross backpay amounts are then reduced by the known interim earnings for Mr. Bronkhorst that AMS has received to date.

(b) The hours, which can reasonably be estimated that discriminatee Ken Falk would have worked, and his rate of pay are denoted in Schedule B. Based upon this, during his backpay period of about March 2, 1998, to about November 14, 2001, Falk would have received net backpay of \$2,431.54, after the deduction of interim earnings. Accordingly, as there were no interim expenses or medical expenses, the total net backpay and expenses due Falk is \$2,431.54 (see Schedule B).

ANSWER: Admitted that there were no interim expenses or medical expenses for inclusion in backpay allegedly due. The remaining allegations are denied. The net backpay for Mr. Falk is not \$2,431.54, it is \$0.00. (*See Attachment 1B.*)

In further answer, the Region has failed to explain its methodology to AMS, and its calculations are based on unreasonable and arbitrary actions. The Region's calculations are also mathematically wrong, and fail to represent an accurate measure of gross or net backpay. Among the errors and objections to the Region's calculations set forth in Schedule B are the following:

- The Region's calculations are based on the incorrect backpay period. Mr. Falk was a salt who is not entitled to reinstatement or any backpay. *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (2007).
- Thus, any alleged backpay period must be limited to no more than six months. *E.g., Jeffs Electric, LLC*, 2007 WL 2735680 (Sep. 17, 2007).
- The Region failed to conduct an appropriate investigation on the salting period, the General Counsel cannot carry its burden under *Oil Capitol Sheet Metal*, and the Specification must be dismissed.
- Mr. Falk has failed to mitigate his alleged backpay damages, was unavailable for work, or improperly limited his efforts to find work during the alleged backpay periods.
- The Region has incorrectly calculated average hours, average OT hours, and average earnings for the identified comparable employees. Having selected the group of comparable employees for determining gross backpay based on average hours or earnings, the Region must use the correct calculations for average hours and wages as set forth by AMS in Attachment 1B.
- The Region cannot ignore ordinary fluctuations in hours, earnings, and wages among the group of comparable employees that it has identified. Doing so is not a reasonable estimate of gross backpay. *E.g., The Painting Co.*, 351 NLRB 42 (2007).
- The Region's calculations are based on erroneous wage rates for discriminatees and fail to apply the correct starting wage rates applicable in 1998.
- No payroll records support an alleged \$4.00 per hour average raise for 1998 or other yearly raises as alleged, and the Region simply ignores the known, applicable wage rate for Mr. Falk for 1998.
- There is no evidence that Mr. Falk has been contacted or identified because the Region has refused to supply AMS with requested

information. As a potential missing discriminatee, the calculation of backpay raises significant legal and policy issues and these allegations should be dismissed. *The Painting Co., supra*.

- Mr. Falk has willfully concealed or refused to cooperate in providing relevant interim earnings information.

Mr. Falk is not entitled to any backpay. But even if he was, the Region's calculations are fundamentally flawed. AMS provides the reasonable and correct backpay calculations based on a six-month backpay period reasonably estimated for the salts. It also includes alternative calculations using the Region's alleged backpay period. (Attachment 1B.) Under either scenario, no backpay is due.

Respondent's calculations are based on payroll records as provided to the Region, use the average hours of the appropriate comparable employees, and use the correct starting wage in 1998, as well as the correct average wage increases among the identified comparable employees under this method. These gross backpay amounts are then reduced by the known interim earnings for Mr. Falk that AMS has received to date.

(c) The hours, which can reasonably be estimated that discriminatee Ted Fuller would have worked, and his rate of pay are denoted in Schedule C. Based upon this, during his backpay period of about March 2, 1998, to about September 22, 1999, Fuller earned more in interim earnings during this time period than he would have earned had he continued working for Respondent during that period. Accordingly, as there were no interim expenses or medical expenses, the total net backpay and expenses due Fuller is zero (see Schedule C).

ANSWER: Admitted that there were no interim expenses or medical expenses and that no backpay is owed to Mr. Fuller. The remaining allegations related to the Region's calculations are denied. (See Exhibit 1C.)

(d) The hours, which can reasonably be estimated that discriminatee Jon Kinney would have worked, and his rate of pay are denoted in Schedule D. Based upon this, during his backpay period of about March 2, 1998, to about August 12, 2002, Kinney earned more in interim earnings during this time period than he would have earned had he continued working for Respondent during that period. Accordingly, as there were no interim expenses or medical expenses, the total net backpay and expenses due Kinney is zero (see Schedule D).

ANSWER: Admitted that there were no interim expenses or medical expenses and that no backpay is owed to Mr. Kinney. The remaining allegations related to the Region's calculations are denied. (See Exhibit 1D.)

(e) The hours, which can reasonably be estimated that discriminatee Grant Maichele would have worked, and his rate of pay are denoted in Schedule E. Based upon this, during his backpay period of about March 2, 1998, to about July 12, 2001, Maichele would have received net backpay of \$4,248.11, after the deduction of interim earnings. Accordingly, as there were no interim expenses or medical expenses, the total net backpay and expenses due Maichele is \$4,248.11 (see Schedule E).

ANSWER: Admitted that there were no interim expenses or medical expenses for inclusion in backpay allegedly due. The remaining allegations are denied. Mr. Maichele is not owed any backpay.

In further answer, the Region has failed to explain its methodology to AMS, and its calculations are based on unreasonable and arbitrary actions. The Region has also failed to provide AMS with requested information for Mr. Maichele, including but not limited to, information related to alleged interim earnings.

The Region's calculations are also mathematically wrong, and fail to represent an accurate measure of gross or net backpay. Among the errors and objections to the Region's calculations set forth in Schedule E are the following:

- The Region's calculations are based on the incorrect backpay period. Mr. Maichele was a salt who is not entitled to reinstatement or any backpay. *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (2007).
- Thus, any alleged backpay period must be limited to no more than six months. *Jeffs Electric, LLC*, 2007 WL 2735680 (Sep. 17, 2007).
- The Region failed to conduct an appropriate investigation on the salting period, the General Counsel cannot carry its burden under *Oil Capitol Sheet Metal*, and the Specification must be dismissed.
- The Region's interim earning calculations are based on inaccurate factual information and cannot be confirmed because the Region has failed to provide AMS with complete or accurate interim earnings information for this discriminatee, including but not limited to, from the Social Security Administration.
- Alternatively, Mr. Maichele has failed to mitigate his alleged backpay damages, was unavailable for work, or improperly limited his efforts to find work during the alleged backpay periods.
- The Region has incorrectly calculated average hours, average OT hours, and average earnings for the identified comparable employees. Having selected the group of comparable employees for determining gross backpay based on average hours or earnings, the Region must use the correct calculations for average hours and wages as set forth by AMS in Attachment 1E.
- The Region cannot ignore ordinary fluctuations in hours, earnings, and wages among the group of comparable employees that it has identified. Doing so is not a reasonable estimate of gross backpay. *E.g., The Painting Co.*, 351 NLRB 42 (2007).
- The Region's calculations are based on erroneous wage rates for discriminatees and fail to apply the correct starting wage rates applicable in 1998.
- No payroll records support an alleged \$4.00 per hour average raise for 1998 or other yearly raises as alleged, and the Region simply ignores the known, applicable wage rate for Mr. Maichele for 1998.

- There is no evidence that Mr. Maichele has been contacted or identified because the Region has refused to supply AMS with requested information. As a potential missing discriminatee, the calculation of backpay raises significant legal and policy issues and the allegations should be dismissed. *The Painting Co., supra*.
- Mr. Maichele has willfully concealed or refused to cooperate in providing relevant interim earnings information.

Mr. Maichele is not entitled to any backpay. But even if he was, the Region's calculations are fundamentally flawed. AMS provides backpay calculations assuming a six-month backpay period reasonably estimated for the salts based on projected interim earnings. It also provides an alternative calculation based on the Region's alleged backpay period ending on July 12, 2001. (Attachment 1E.) Even under the Region's alleged backpay periods, and even using the Region's incomplete and unverified interim earnings numbers, the amount of anticipated net backpay would be \$0.00.

(f) The hours, which can reasonably be estimated that discriminatee Marty Preston would have worked, and his rate of pay are denoted in Schedule F. Based upon this, during his backpay period of about March 2, 1998, to about December 17, 2001, Preston would have received net backpay of \$5,953.53, after the deduction of interim earnings. Accordingly, as there were no interim expenses or medical expenses, the total net backpay and expenses due Preston is \$5,953.53 (see Schedule F).

ANSWER: Admitted that there were no interim expenses or medical expenses for inclusion in backpay allegedly due. The remaining allegations are denied. Mr. Preston is not owed \$5,953.53 in backpay, he is owed \$0.00. (Attachment 1F.)

In further answer, the Region has failed to explain its methodology to AMS, and its calculations are based on unreasonable and arbitrary actions. The Region's calculations are also mathematically wrong, and fail to represent an accurate measure of gross or net backpay. Among the errors and objections to the Region's calculations set forth in Schedule F are the following:

- The Region uses an incorrect number for quarterly interim earnings in each quarter of 2000 (\$8,883.02/quarter). The undisputed SSA records establish that the number should be at least \$11,329.54/quarter.
- The Region's calculations are based on the incorrect backpay period. Mr. Preston was a salt who is not entitled to reinstatement or any backpay. *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (2007).
- Thus, any alleged backpay period must be limited to no more than six months. *Jeffs Electric, LLC*, 2007 WL 2735680 (Sep. 17, 2007).
- The Region failed to conduct an appropriate investigation on the salting period, the General Counsel cannot carry its burden under *Oil Capitol Sheet Metal*, and the Specification must be dismissed.

- Mr. Preston has failed to mitigate his alleged backpay damages, was unavailable for work, or improperly limited his efforts to find work during the alleged backpay periods.
- The Region has incorrectly calculated average hours, average OT hours, and average earnings for the identified comparable employees. Having selected the group of comparable employees for determining gross backpay based on average hours or earnings, the Region must use the correct calculations for average hours and wages as set forth by AMS in Attachment 1F.
- The Region cannot ignore ordinary fluctuations in hours, earnings, and wages among the group of comparable employees that it has identified. Doing so is not a reasonable estimate of gross backpay. *E.g., The Painting Co.*, 351 NLRB 42 (2007).
- The Region's calculations are based on erroneous wage rates for discriminatees and fail to apply the correct starting wage rates applicable in 1998.
- No payroll records support an alleged \$4.00 per hour average raise for 1998 or other yearly raises as alleged, and the Region simply ignores the known, applicable wage rate for Mr. Preston for 1998.
- There is no evidence that Mr. Preston has been contacted or identified because the Region has refused to supply AMS with requested information. As a potential missing discriminatee, the calculation of backpay raises significant legal and policy issues and the allegations should be dismissed. *The Painting Co.*, *supra*.
- Mr. Preston has willfully concealed or refused to cooperate in providing relevant interim earnings information.

Mr. Preston is not entitled to any backpay. But even if he was, the Region's calculations are fundamentally flawed. AMS provides the reasonable and correct backpay calculations based a six-month backpay period reasonably estimated for the salts. It also includes an alternative calculation based on the Region's alleged backpay period ending on December 17, 2001. (Attachment 1F.) Under either scenario, Mr. Preston is owed no backpay.

Respondent's calculations are based on payroll records as provided to the Region, use the average hours of the appropriate comparable employees, and use the correct starting wage in 1998, as well as the correct average wage increases among the identified comparable employees under this method. The gross backpay amounts are then reduced by interim earnings information that AMS has received to date.

(g) The hours, which can reasonably be estimated that discriminatee Tobin Rees (now deceased) would have worked, and his rate of pay are denoted in Schedule G. Based upon this, during his backpay period of about March 2, 1998, to about March 25, 2002, Rees earned more in interim earnings during this time period than he would have earned had he continued working for Respondent during that period. Accordingly, as there were no interim

expenses or medical expenses, the total net backpay and expenses due the estate of Rees is zero (see Schedule G).

ANSWER: Admitted that there were no interim expenses or medical expenses and that no backpay is owed to Mr. Rees. The remaining allegations related to the Region's calculations are denied. (See Exhibit 1G.)

(h) The hours, which can reasonably be estimated that discriminatee Max Roggow would have worked, and his rate of pay are denoted in Schedule H. Based upon this, during his backpay period of about March 2, 1998, to about December 17, 2001, Roggow would have received net backpay of \$21,876.53, after the deduction of interim earnings. Accordingly, as there were no interim expenses or medical expenses, the total net backpay and expenses due Roggow is \$21,876.53 (see Schedule H).

ANSWER: Admitted that there were no interim expenses or medical expenses for inclusion in backpay allegedly due. The remaining allegations are denied. Mr. Roggow is not owed \$21,876.53; he is not owed any backpay.

In further answer, the Region has failed to explain its methodology to AMS, and its calculations are based on unreasonable and arbitrary actions. The Region has also failed to provide AMS with full and complete information for Mr. Roggow, including but not limited to, information related to interim earnings.

The Region's calculations are also mathematically wrong, and fail to represent an accurate measure of gross or net backpay. Among the errors and objections to the Region's calculations set forth in Schedule H are the following:

- The Region's calculations are based on the incorrect backpay period. Mr. Roggow was a salt who is not entitled to reinstatement or any backpay. *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (2007).
- Thus, any alleged backpay period must be limited to no more than six months. *Jeffs Electric, LLC*, 2007 WL 2735680 (Sep. 17, 2007).
- The Region failed to conduct an appropriate investigation on the salting period, the General Counsel cannot carry its burden under *Oil Capitol Sheet Metal*, and the Specification must be dismissed.
- The Region's interim earning calculations are based on inaccurate factual information and cannot be answered in full because the Region has failed to provide AMS with interim earnings information for this discriminatee, including but not limited to, information from the Social Security Administration.
- Alternatively, Mr. Roggow has failed to mitigate his alleged backpay damages, was unavailable for work, or improperly limited his efforts to find work during the alleged backpay periods.
- The Region has incorrectly calculated average hours, average OT hours, and average earnings for the identified comparable employees. Having selected the group of comparable employees for determining

gross backpay based on average hours or earnings, the Region must use the correct calculations for average hours and wages as set forth by AMS in Attachment 1H.

- The Region cannot ignore ordinary fluctuations in hours, earnings, and wages among the group of comparable employees that it has identified. Doing so is not a reasonable estimate of gross backpay. *E.g., The Painting Co.*, 351 NLRB 42 (2007).
- The Region's calculations are based on erroneous wage rates for discriminatees and fail to apply the correct starting wage rates applicable in 1998.
- No payroll records support an alleged \$4.00 per hour average raise for 1998 or other yearly raises as alleged, and the Region simply ignores the known, applicable wage rate for Mr. Roggow for 1998.
- There is no evidence that Mr. Roggow has been contacted or identified because the Region has refused to supply AMS with requested information. As a potential missing discriminatee, the calculation of backpay raises significant legal and policy issues and the allegations should be dismissed. *The Painting Co.*, *supra*.
- Mr. Roggow has willfully concealed or refused to cooperate in providing relevant interim earnings information.

Mr. Roggow is not entitled to any backpay. But even if he was, the Region's calculations are fundamentally flawed. AMS provides backpay calculations assuming a six-month backpay period reasonably estimated for the salts based on projected interim earnings. It also provides an alternative calculation based on the Region's alleged backpay period ending on July 12, 2001 and based on the Region's incomplete and unverified interim earnings allegations. (Attachment 1H.) The facts will establish that no backpay is due. However, even under the Region's alleged backpay periods and even using the Region's incomplete interim earnings numbers, the net backpay in dispute is only \$12,410.19.

(i) The hours, which can reasonably be estimated that discriminatee Brian Rowden would have worked, and his rate of pay are denoted in Schedule I. Based upon this, during his backpay period of about March 2, 1998, to about September 22, 1999, Rowden would have received net backpay of \$4,445.24, after the deduction of interim earnings. Accordingly, as there were no interim expenses or medical expenses, the total net backpay and expenses due Rowden is \$4,445.24 (see Schedule I).

ANSWER: Admitted that there were no interim expenses or medical expenses for inclusion in backpay allegedly due. The remaining allegations are denied. Mr. Rowden is not owed any backpay.

In further answer, the Region has failed to explain its methodology to AMS, and its calculations are based on unreasonable and arbitrary actions. The Region has also failed to provide AMS with full and complete information for Mr. Rowden, including but not limited to, information related to interim earnings.

The Region's calculations are also mathematically wrong, and fail to represent an accurate measure of gross or net backpay. Among the errors and objections to the Region's calculations set forth in Schedule I are the following:

- The Region's calculations are based on the incorrect backpay period. Mr. Rowden was a salt who is not entitled to reinstatement or any backpay. *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (2007).
- Thus, any alleged backpay period must be limited to no more than six months. *Jeffer Electric, LLC*, 2007 WL 2735680 (Sep. 17, 2007).
- The Region failed to conduct an appropriate investigation on the salting period, the General Counsel cannot carry its burden under *Oil Capitol Sheet Metal*, and the Specification must be dismissed.
- The Region's interim earning calculations are based on inaccurate factual information and cannot be confirmed because the Region has failed to provide AMS with interim earnings information for this discriminatee, including but not limited to, information from the Social Security Administration.
- Alternatively, Mr. Rowden has failed to mitigate his alleged backpay damages, was unavailable for work, or improperly limited his efforts to find work during the alleged backpay periods.
- The Region has incorrectly calculated average hours, average OT hours, and average earnings for the identified comparable employees. Having selected the group of comparable employees for determining gross backpay based on average hours or earnings, the Region must use the correct calculations for average hours and wages as set forth by AMS in Attachment 11.
- The Region cannot ignore ordinary fluctuations in hours, earnings, and wages among the group of comparable employees that it has identified. Doing so is not a reasonable estimate of gross backpay. *E.g., The Painting Co.*, 351 NLRB 42 (2007).
- The Region's calculations are based on erroneous wage rates for discriminatees and fail to apply the correct starting wage rates applicable in 1998.
- No payroll records support an alleged \$4.00 per hour average raise for 1998 or other yearly raises as alleged, and the Region simply ignores the known, applicable wage rate for Mr. Rowden for 1998.
- There is no evidence that Mr. Rowden has been contacted or identified because the Region has refused to supply AMS with requested information. As a potential missing discriminatee, the calculation of backpay raises significant legal and policy issues and the allegations should be dismissed. *The Painting Co., supra*.
- Mr. Rowden has willfully concealed or refused to cooperate in providing relevant interim earnings information.

Mr. Rowden is not entitled to any backpay. But even if he was, the Region's calculations are fundamentally flawed. AMS provides backpay calculations assuming a

six-month backpay period reasonably estimated for the salts based on projected interim earnings. It also provides an alternative calculation based on the Region's alleged backpay period ending on July 12, 2001. (Attachment 1L.) Even when using the Region's alleged backpay period and flawed interim earnings numbers, Mr. Rowden is owed no backpay.

(j) The hours, which can reasonably be estimated that discriminatee Steve Titus (now deceased) would have worked, and his rate of pay are denoted in Schedule J. Based upon this, during his backpay period of about March 2, 1998, to about June 14, 2001, Titus would have received net backpay of \$8,720.87, after the deduction of interim earnings. Accordingly, as there were no interim expenses or medical expenses, the total net backpay and expenses due Titus is \$8,720.87 (see Schedule J).

ANSWER: Admitted that there were no interim expenses or medical expenses for inclusion in backpay allegedly due. The remaining allegations are denied. Mr. Titus is not owed \$8,720.87 in backpay, he is owed \$0.00. (Attachment 1J.)

In further answer, the Region has failed to explain its methodology to AMS, and its calculations are based on unreasonable and arbitrary actions. The Region's calculations are also mathematically wrong, and fail to represent an accurate measure of gross or net backpay. Among the errors and objections to the Region's calculations set forth in Schedule J are the following:

- **The Region's calculations are based on the incorrect backpay period. Mr. Titus was a salt who is not entitled to reinstatement or any backpay. *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (2007).**
- **Thus, any alleged backpay period must be limited to no more than six months. *Jeffs Electric, LLC*, 2007 WL 2735680 (Sep. 17, 2007).**
- **The Region failed to conduct an appropriate investigation on the salting period, the General Counsel cannot carry its burden under *Oil Capitol Sheet Metal*, and the Specification must be dismissed.**
- **Mr. Titus has failed to mitigate his alleged backpay damages, was unavailable for work, or improperly limited his efforts to find work during the alleged backpay periods.**
- **The Region has incorrectly calculated average hours, average OT hours, and average earnings for the identified comparable employees. Having selected the group of comparable employees for determining gross backpay based on average hours or earnings, the Region must use the correct calculations for average hours and wages as set forth by AMS in Attachment 1J.**
- **The Region cannot ignore ordinary fluctuations in hours, earnings, and wages among the group of comparable employees that it has identified. Doing so is not a reasonable estimate of gross backpay. *E.g., The Painting Co.*, 351 NLRB 42 (2007).**
- **The Region's calculations are based on erroneous wage rates for discriminatees and fail to apply the correct starting wage rates applicable in 1998.**

- No payroll records support an alleged \$4.00 per hour average raise for 1998 or other yearly raises as alleged, and the Region simply ignores the known, applicable wage rate for Mr. Titus for 1998.
- The Region failed to account for Mr. Titus's death. His death renders him a missing discriminatee for which the calculation of backpay raises significant legal and policy issues and the allegations should be dismissed. *The Painting Co., supra*. His death may also unfairly prejudice Respondents' rights and ability to secure interim earnings information.
- Mr. Titus and/or his estate, or heirs has willfully concealed or refused to cooperate in providing relevant interim earnings information.

Mr. Titus is not entitled to any backpay. But even if he was, the Region's calculations are fundamentally flawed. AMS provides the reasonable and correct backpay calculations based on a six-month backpay period reasonably estimated for the salts. It also provides an alternative calculation based on the Region's alleged backpay period ending on June 14, 2001. (Attachment 1J.) Even under the Region's flawed period, Mr. Titus would only be owed \$1690.92 in net backpay.

Respondent's calculations are based on payroll records as provided to the Region, use the average hours of the appropriate comparable employees, and use the correct starting wage in 1998, as well as the correct average wage increases among the identified comparable employees under this method. The gross backpay amounts are reduced by the interim earnings information for Mr. Titus that AMS has received to date.

(k) The hours, which can reasonably be estimated that discriminatee Scott Calhoun (now deceased) would have worked, and his rate of pay are denoted in Schedule K. Based upon this, during his backpay period of about August 5, 1998, to about December 31, 2009, Calhoun would have received net backpay of \$245,106.78, after the deduction of interim earnings. Accordingly, as there were no interim expenses or medical expenses, the total net backpay and expenses due the estate of Calhoun is \$245,106.78 (see Schedule K).

ANSWER: Admitted that there were no interim expenses or medical expenses for inclusion in backpay allegedly due. The remaining allegations are denied. Mr. Calhoun is owed no backpay and he was likely unavailable, unable or unwilling to work for some or all of the Region's specified backpay period due to medical issues.

The Amended Specification reveals that the Region's investigation was deficient. The \$245,106.78 alleged amount remains unexplained, is based on flawed factual and legal positions, and is artificially inflated. This is evident from even a cursory understanding of the facts. During the Region's specified backpay period, Mr. Calhoun worked out of the same local and was therefore subject to the same collective bargaining agreements as the other discriminatees. Nevertheless, the Region has alleged that Mr. Calhoun is owed nearly thirty-seven times more net backpay than the average alleged backpay owed to Bronkhorst, Falk, Fuller, Kinney, Maichele, Preston, Rees, Roggow, Rowden, Titus, and Kiss. This discrepancy cannot be explained merely by Mr. Calhoun's

comparatively long backpay period; the Region has determined that Mr. Calhoun should be awarded nearly six times more backpay than Mr. Hill even though Mr. Hill had a longer backpay period *and* earned a higher wage rate because Mr. Hill was a journeyman pipefitter. The radical disparity between the net backpay amounts identified by the Region allegedly owed to Mr. Calhoun and those net backpay amounts allegedly owed to the other discriminatees calls the adequacy of the Region's investigation into question and suggests that the Region failed to follow the investigatory practices specified by Casehandling Manual Sections 10538 and 10550. Ultimately, the Region has entirely failed to investigate or explain the factual basis for the large disparity between the net backpay allegedly owed to Mr. Calhoun and the net backpay allegedly owed to the other discriminatees.

The Amended Specification also reveals that the Region materially failed to communicate to AMS crucial information regarding Mr. Calhoun's ability and willingness to work, to the extent this information was collected by the Region during its investigation. The interim earnings information that AMS has obtained from the Region to date is incomplete and unverified and AMS has reasons to doubt its factual accuracy. For example, the Region has provided no information or documentation to support alleged interim earnings for the entire alleged backpay period between 1998 and 2004. Additionally, in 2006 the Region alleges that Mr. Calhoun only earned \$446.16 for the entire year, yet claims full backpay for this period. Moreover, the evidence of Mr. Calhoun's interim earnings that the Region has provided to AMS contain substantial unexplained redactions and are dissimilar to the itemized official Statements of Earnings from the Social Security Administration that the Region provided to AMS for many other discriminatees. In sum, the Region has provided no evidence that Mr. Calhoun worked as a plumber/pipefitter during the relevant alleged backpay periods, and there are significant periods where the information suggests that Mr. Calhoun was voluntarily or involuntarily unavailable for work, possibly due to medical or other issues. Mr. Calhoun's availability to work is especially suspect during the Region's alleged backpay period because, by the Region's own admission, Mr. Calhoun stopped seeking employment less than 2 years before he died. Evidence proving that Mr. Calhoun was ready, able and willing to work during the entirety of the Region's backpay period is critical because AMS cannot be responsible for any net backpay during any period where Mr. Calhoun was either unable or unwilling to work. The Region has failed to provide any such information to AMS before filing this Amended Specification, however.

The Region's calculations are also mathematically wrong, and fail to represent an accurate measure of gross or net backpay. Among the other errors and objections to the Region's calculations set forth in Schedule K are the following:

- The Region's calculations are based on the incorrect backpay period. Mr. Calhoun was an apprentice applicant and salt who is not entitled to instatement or any backpay.
- Any backpay period alleged must be limited to no more than six months. *Oil Capitol Sheet Metal, Inc.* The Region failed to conduct an appropriate investigation on the salting period and cannot carry its burden.

- There is no evidence to support the Region's claim that Mr. Calhoun worked as a journeyman plumber/pipefitter.
- The Region's interim earning calculations are based on inaccurate factual information and cannot be confirmed because the Region has failed to provide AMS with verifiable interim earnings information for this discriminatee from the Social Security Administration and has refused or failed to provide AMS with the identity of the employers for Mr. Calhoun during the alleged periods.
- Alternatively, Mr. Calhoun has failed to mitigate his alleged backpay damages.
- AMS denies that Mr. Calhoun's work, earnings, and other conditions of employment are comparable to George Jeudevine, James Flanningan, Ralph Dazell, Christopher Holwerda, and Ned Clysdale. Mr. Calhoun was not a journeyman, he was an apprentice and applied for an apprentice position. There is no evidence that Mr. Calhoun ever became a journeyman.
- AMS denies that the 1998 wage rate for Mr. Calhoun can be based on the average 1998 wages of Jim Bronkhorst, Ken Falk, Ted Fuller, Grant Maichele, Marty Preston, Tobin Rees, Max Roggow, Steve Titus, and Jon Kinney. These are journeyman and Mr. Calhoun was an apprentice.
- The Region failed to apply consistently or correctly the average earnings of the appropriate apprentice comparable employee (D. Rice) in determining gross backpay alleged.
- The Region has incorrectly calculated average hours, average OT hours, and earnings for the comparable employee.
- The Region's calculations are based on erroneous wage rates for discriminatees and fail to apply the correct starting wage rates for apprentices applicable in 1998.
- No payroll records support the hourly average raises as alleged.
- The Region failed to account for Mr. Calhoun's death. His death renders him a missing discriminatee for which the calculation of backpay raises significant legal and policy issues and the allegations should be dismissed. *The Painting Co., supra*. His death may also unfairly prejudice Respondents' rights and ability to secure interim earnings information.
- Mr. Calhoun has willfully concealed or refused to cooperate in providing relevant interim earnings information.
- Mr. Calhoun became unavailable for work during the alleged backpay period.

Mr. Calhoun is not entitled to any backpay. But even if he was, the Region's calculations are fundamentally flawed, and AMS provides alternative calculations that are reasonable and lawful. First, AMS provides backpay calculations based on the average earnings of the appropriate comparable apprentice (D. Rice) assuming a six-month backpay period reasonably estimated for the salts. (Attachment 1K.) Second, AMS is

providing similar calculations if the backpay period were to end on December 31, 2009. Both sets of calculations use the average earnings for the appropriate comparable employee, and the correct apprentice wage rates. (Attachment 1K.) Both must also still be reduced based on full, complete, and accurate actual interim earnings for Mr. Calhoun. However, using a conservative estimate of projected interim earnings shows that no backpay is due, even under the Region's flawed alleged backpay period.

(I) The hours, which can reasonably be estimated that discriminatee Terri Jo Conroy would have worked, and her rate of pay are denoted in Schedule L. Based upon this, during her backpay period of about August 5, 1998, to about November 1, 2010, Conroy would have received net backpay of \$253,212.37, after the deduction of interim earnings. Accordingly, as there were no interim expenses or medical expenses, the total net backpay and expenses due Conroy is \$253,212.37 (see Schedule L).

ANSWER: Admitted that there were no interim expenses or medical expenses for inclusion in backpay allegedly due. The remaining allegations are denied. Ms. Conroy is owed no backpay. She was likely unavailable, unable or unwilling to work for some or all of the Region's specified backpay period due to medical issues. Ms. Conroy was also not likely working as a plumber/pipefitter during some or all of the Region's specified backpay period.

The Amended Specification reveals that the Region's investigation was deficient. The \$253,212.37 alleged amount remains unexplained, is based on flawed factual and legal positions, and is artificially inflated. This is evident from even a cursory understanding of the facts. During the Region's specified backpay period, Ms. Conroy worked out of the same local and was therefore subject to the same collective bargaining agreements as the other discriminatees. Nevertheless, the Region has alleged that Ms. Conroy is owed nearly thirty-eight times more net backpay than the average alleged backpay owed to Bronkhorst, Falk, Fuller, Kinney, Maichele, Preston, Rees, Roggow, Rowden, Titus, and Kiss. This discrepancy cannot be explained merely by Ms. Conroy's comparatively long backpay period; the Region has determined that Ms. Conroy should be awarded over six times more backpay than Mr. Hill even though Mr. Hill had a longer backpay period *and* earned a higher wage rate because Mr. Hill was a journeyman pipefitter. The radical disparity between the net backpay amounts identified by the Region allegedly owed to Ms. Conroy and those net backpay amounts allegedly owed to the other discriminatees calls the adequacy of the Region's investigation into question and suggests that the Region failed to follow the investigatory practices specified by Casehandling Manual Sections 10538 and 10550. Ultimately, the Region has entirely failed to investigate or explain the factual basis for the large disparity between the net backpay allegedly owed to Ms. Conroy and the net backpay allegedly owed to the other discriminatees.

The Amended Specification also reveals that the Region materially failed to communicate to AMS crucial information regarding Ms. Conroy's ability and willingness to work, to the extent this information was collected by the Region during its investigation. The interim earnings information that AMS has obtained from the Region to date is incomplete and unverified and AMS has reasons to doubt its factual accuracy. For example, the Region has provided AMS unverified, unofficial documents that allegedly

prove Ms. Conroy earned \$6,720.00 during the entirety of the 2010 calendar year, and only \$18,593.00 for the entirety of the 2009 calendar year. The Region nevertheless calculates Ms. Conroy's net backpay using (erroneous) full gross backpay calculations for the entirety of these years. These same documents contain substantial unexplained redactions and are dissimilar to the itemized official Statements of Earnings from the Social Security Administration that the Region provided to AMS for many other discriminatees. In sum, the Region has provided no evidence that Ms. Conroy worked as a plumber/pipefitter during the relevant alleged backpay periods, and there are significant periods where the information suggests that Ms. Conroy was voluntarily or involuntarily unavailable for work, possibly due to medical or other issues. Ms. Conroy's availability to work is especially suspect during the Region's alleged backpay period because, by the Region's own admission, Ms. Conroy's backpay period ended when she filed for Social Security disability benefits. Evidence proving that Ms. Conroy was ready, able and willing to work during the entirety of the Region's backpay period is critical in this case because AMS cannot be responsible for any net backpay during any period where Ms. Conroy was either unable or unwilling to work. The Region has failed to provide any such information to AMS before filing this Amended Specification, however.

Further, the Region has refused or failed to provide information regarding Ms. Conroy's employers to support its alleged interim earnings. AMS believes that this information will confirm that Ms. Conroy was not working as a plumber/pipefitter during some or all of the Region's specified backpay period.

The Region's calculations are also mathematically wrong, and fail to represent an accurate measure of gross or net backpay. Among the other errors and objections to the Region's calculations set forth in Schedule L are the following:

- The Region's calculations are based on the incorrect backpay period. Ms. Conroy was, at best, an apprentice applicant and salt who is not entitled to instatement, and any backpay period must be limited to no more than six months. *Oil Capitol Sheet Metal, Inc.* The Region failed to conduct an appropriate investigation on the salting period and cannot carry its burden.
- There is no evidence that Ms. Conroy worked as a plumber/pipefitter.
- The Region's interim earning calculations are based on inaccurate factual information and cannot be confirmed because the Region has failed to provide AMS with verifiable interim earnings information for this discriminatee from the Social Security Administration.
- Alternatively, Ms. Conroy has failed to mitigate her alleged backpay damages.
- AMS denies that Ms. Conroy's work, earnings, and other conditions of employment are comparable to George Jeudevine, James Flanningan, Ralph Dazell, Christopher Holwerda, and Ned Clysdale. Ms. Conroy was not a journeyman, applied for an apprentice position, and did not work as a plumber/pipefitter.

- AMS denies that the 1998 wage rate for Ms. Conroy can be based on the average 1998 wages of Jim Bronkhorst, Ken Falk, Ted Fuller, Grant Maichele, Marty Preston, Tobin Rees, Max Roggow, Steve Titus, and Jon Kinney. These are journeyman and Ms. Conroy was an apprentice applicant.
- The Region failed to apply the average earnings of the appropriate apprentice comparable employee (D. Rice) in determining gross backpay alleged.
- The Region has incorrectly calculated average hours, average OT hours, and earnings for the identified comparable employee.
- The Region's calculations are based on erroneous wage rates for discriminatees and fail to apply the correct apprentice wage rates for the alleged backpay periods.
- The Region has incorrectly used purported journeymen comparable employees when Ms. Conroy was an apprentice applicant.
- No payroll records support the hourly average raises as alleged.
- There is no evidence that Ms. Conroy has been contacted or identified because the Region has refused to supply AMS with requested information. As a potential missing discriminatee, the calculation of backpay raises significant legal and policy issues and the allegations should be dismissed. *The Painting Co., supra*.
- Ms. Conroy has willfully concealed or refused to cooperate in providing relevant interim earnings information.
- Ms. Conroy voluntarily or involuntarily removed herself from the workforce and did not (or could not) work as a plumber/pipefitter and her alleged gross backpay amounts must be reduced accordingly.

Ms. Conroy is not entitled to any backpay. But even if she was, the Region's calculations are fundamentally flawed, and AMS provides alternative calculations. First, AMS provides backpay calculations based on the average earnings of the comparable apprentice assuming a six-month backpay period reasonably estimated for the salts. Second, AMS is providing similar calculations if the backpay period were to end on November 1, 2010 as alleged by the Region. Both sets of calculations use the average earnings for the appropriate comparable employee, and the correct apprentice wage rates. (Attachment 1L.) Both must also still be reduced based on complete and accurate interim earnings for Ms. Conroy. But even using the Region's erroneous backpay period and unsupported, incomplete interim earnings information, the amount in dispute is only \$40,988.54.

(m) The hours, which can reasonably be estimated that discriminatee Harold Hill would have worked, and his rate of pay are denoted in Schedule M. Based upon this, during his backpay period of about August 5, 1998, to about November 7, 2014, Hill would have received net backpay of \$41,614.17, after the deduction of interim earnings. Accordingly, as there were no interim expenses or medical expenses, the total net backpay and expenses due Hill is \$41,614.17 (see Schedule M).

ANSWER: Admitted that there were no interim expenses or medical expenses for inclusion in backpay allegedly due. The remaining allegations are denied. Mr. Hill is owed no backpay.

In further answer, the Region has failed to explain its methodology to AMS, and its calculations are based on incorrect legal principles. As detailed above in prior answers, the Region's method is not reasonable. Its calculations are also mathematically wrong, and fail to represent an accurate measure of gross or net backpay. The Region also fails to correctly apply an average earnings/hours method for estimating gross backpay and fails to use appropriate comparable employees consistently in each quarter of the alleged backpay periods. Among the errors and objections to the Region's calculations set forth in Schedule M are the following:

- The Region's calculations are based on the incorrect backpay period. Mr. Hill was a salt who is not entitled to instatement, and any backpay period must be limited to no more than six months. *Oil Capitol Sheet Metal, Inc.* The Region failed to conduct an appropriate investigation on the salting period and cannot carry its burden.
- Alternatively, Mr. Hill has failed to mitigate his alleged backpay damages.
- The Region has incorrectly calculated average hours, average OT hours, and earnings for the identified comparable employees.
- The Region's calculations are based on erroneous wage rates for discriminatees and fail to apply the correct starting wage rates applicable in 1998.
- No payroll records support a \$4.00 per hour average raise for 1998 or other yearly average raises as alleged, and the Region simply ignores the correct average applicable wage rate for Mr. Hill in 1998. The average rate to use for 1998 is \$14.11 the average wage of the comparable journeymen identified by the Region.
- No payroll records support the hourly average raises as alleged.
- The Region incorrectly determined the average hours worked by D. Rice from 2003 during the alleged backpay period. Respondent denies that the backpay period continues as alleged, but if backpay is to be awarded from 2003 until 2014 the Region must use continuing average weekly hours worked between 1998 and 2003 for the comparable journeymen to determine Mr. Hill's average hours worked per week. Under the Amended Specification the calculations of average hours and gross backpay are artificially and arbitrarily inflated and are not supported by payroll records.

Mr. Hill is not entitled to any backpay. But even if he was, the Region's calculations are fundamentally flawed, and AMS provides alternative backpay calculations using the average hours method for the seven identified comparable journeymen assuming a six-month backpay period reasonably estimated for the salts and then assuming that the backpay period were to end on November 29, 2014 – the last pay

week including the original submission date of this Answer to the Amended Specification. (Attachment 1M.)

These calculations use the average hours of comparable employees, average wage increases among the identified comparable employees, and projected wage increases from 2002-2014. Even using the Region's erroneous backpay period and unsupported, incomplete interim earnings information, the amount in dispute is only \$16,752.88.

(n) The hours, which can reasonably be estimated that discriminatee Jeff Kiss would have worked, and his rate of pay are denoted in Schedule N. Based upon this, during his backpay period of about August 5, 1998, to about November 26, 2001, Kiss would have received net backpay of \$13,691.21, after the deduction of interim earnings. Accordingly, as there were no interim expenses or medical expenses, the total net backpay and expenses due Kiss is \$13,691.21 (see Schedule N).

ANSWER: Admitted that there were no interim expenses or medical expenses for inclusion in backpay allegedly due. The remaining allegations are denied. The net backpay for Mr. Kiss is not \$13,641.21, it is \$0.00. (See Attachment 1N.)

In further answer, the Region has failed to explain its methodology to AMS, and its calculations are based on unreasonable and arbitrary actions. The Region's calculations are also mathematically wrong, and fail to represent an accurate measure of gross or net backpay. Among the errors and objections to the Region's calculations set forth in Schedule G are the following:

- The Region's calculations contain an obvious math error for the first quarter of 2000. The Region's spreadsheet fails to reduce the alleged backpay for that quarter by the alleged interim earnings in the amount of \$10,972.66, thus reducing the total amount alleged to \$3,344.51.**
- The Region's calculations are based on the incorrect backpay period. Mr. Kiss was a salt who is not entitled to reinstatement or any backpay. *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (2007).**
- Thus, any alleged backpay period must be limited to no more than six months. *Jeffs Electric, LLC*, 2007 WL 2735680 (Sep. 17, 2007).**
- The Region failed to conduct an appropriate investigation on the salting period, the General Counsel cannot carry its burden under *Oil Capitol Sheet Metal*, and the Specification must be dismissed.**
- Alternatively, Mr. Kiss has failed to mitigate his alleged backpay damages, was unavailable for work, or improperly limited his efforts to find work during the alleged backpay periods.**
- The Region has incorrectly calculated average hours, average OT hours, and average earnings for the identified comparable employees. Having selected the group of comparable employees for determining gross backpay based on average hours or earnings, the Region must**

use the correct calculations for average hours and wages as set forth by AMS in Attachment 1.

- The Region cannot ignore ordinary fluctuations in hours, earnings, and wages among the group of comparable employees that it has identified. Doing so is not a reasonable estimate of gross backpay. *E.g., The Painting Co.*, 351 NLRB 42 (2007).
- The Region's calculations are based on erroneous wage rates for discriminatees and fail to apply the correct starting wage rates applicable in 1998, including a failure to reduce the starting wage based on the fact that Mr. Kiss was an apprentice and not a journeymen.
- No payroll records support an alleged \$4.00 per hour average raise for 1998 or other yearly raises as alleged, and the Region simply ignores the known, applicable wage rate for Mr. Kiss for 1998.
- There is no evidence that Mr. Kiss has been contacted or identified because the Region has refused to supply AMS with requested information. As a potential missing discriminatee, the calculation of backpay raises significant legal and policy issues and the allegations should be dismissed. *The Painting Co., supra*.
- Mr. Kiss has willfully concealed or refused to cooperate in providing relevant interim earnings information.

Mr. Kiss is not entitled to any backpay. But even if he was, AMS provides the reasonable and correct backpay calculations assuming a six-month backpay period reasonably estimated for the salts and then assuming that the backpay period were to end on March 25, 2002 as alleged. (Attachment 1N.) Mr. Kiss is not entitled to backpay under either scenario.

8. Summarizing the facts and figures above and denoted in Schedules A through N, Respondent's obligation to make whole the above-named discriminatees for the period covered by this amended compliance specification, in accordance with the Board's Orders in Cases 07-CA-040907 and 07-CA-041390, as enforced by the United States Court of Appeals for the District of Columbia Circuit, will be substantially discharged by payment of the following amounts, plus interest computed according to Board policy, as stated in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), less all tax withholdings as required by Federal, state, and municipal law:

Jim Bronkhorst	\$	11,964.66
Ken Falk	\$	2,431.54
Ted Fuller	\$	0.00
Jon Kinney	\$	0.00
Grant Maichele	\$	4,248.11
Marty Preston	\$	5,953.53
Tobin Rees	\$	0.00
Max Roggow	\$	21,876.53

Brian Rowden	\$	4,445.24
Steve Titus	\$	8,720.87
Scott Calhoun	\$	245,106.78
Terri Jo Conroy	\$	253,212.37
Harold Hill	\$	41,614.17
Jeff Kiss	\$	<u>13,691.21</u>

TOTAL \$ 613,265.01

ANSWER: Denied as untrue. In further answer, Respondent incorporates its answers to paragraphs 1-7 *supra*.

WHEREFORE, Respondent requests that the Compliance Specification be dismissed in its entirety and that the Respondent be awarded its costs, reasonable attorneys' fees incurred in filing this answer and defending these allegations, and such other relief as may be just and proper.

ADDITIONAL AFFIRMATIVE AND OTHER DEFENSES

1. The Compliance Specification should be dismissed for lack of jurisdiction as the National Labor Relations Board lacks a lawful and sufficient quorum and the authority to act. *E.g., Noel Canning v. NLRB* (D.C. Cir. No. 12-1115, Jan. 25, 2013).

2. The Region deprived AMS of due process and failed to adhere to applicable standards by (including but not limiting to) failing to comprehensively investigate the subject matter of the Amended Specification pursuant to the procedures required by the NLRB's Casehandling Manual; by failing to provide AMS with complete, verifiable and non-redacted information related to the claims made in the Amended Specification; and by failing to properly calculate amounts of gross backpay and offsetting interim earnings relevant to discriminatees in this case. AMS has been substantially prejudiced by the Region's deprivation of due process.

3. The Specification must be dismissed because at that time the Board lacked authority to appoint the Regional Director who is therefore without authority to issue or proceed with the Compliance Specification. Such actions are ultra vires, unconstitutional, deprive AMS of basic due process, and will impose unfair prejudice and harm to Respondent.

4. The NLRB's rule in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010) regarding calculation of interest on a daily compounding basis should not be applied retroactively in this case because doing so is manifestly unjust and will cause substantial unfair prejudice to Respondent.

5. The General Counsel cannot recover some or all of the alleged backpay because of: (a) unreasonable delay by the Board and General Counsel; (b) laches; and (c) a failure to secure and preserve relevant information.

6. Some or all of the alleged backpay periods should be limited or reduced based on the discriminatees' unavailability, illness, injury, or unwillingness to work.

7. Respondent reserves the right to add additional defenses as additional information is provided and discovered.

MILLER JOHNSON

Dated: December 12, 2014

By Keith E. Eastland (by AC)

David M. Buday

Keith E. Eastland

Business Address:

250 Monroe Avenue NW, Suite 800

Grand Rapids, Michigan 49501-0306

Telephone: (616) 831-1700

CERTIFICATE OF SERVICE

Keith E. Eastland hereby certifies that, on the 12th day of December, 2014, he directed Robin Takens, an employee of the law firm of Miller Johnson, to serve a copy of the Respondent's Answer to "Amended Compliance Specification and Notice of Hearing" upon the following:

John Huizinga
Allied Mechanical Services, Inc.
2211 Miller Road
P.O. Box 2587
Kalamazoo, MI 49001-4119

Tinamarie Pappas
Law Offices of Tinamarie Pappas
4661 Pontiac Trail
Ann Arbor, MI 48105-9365

Plumber and Pipefitters Local 357
5070 East Main Street
Kalamazoo, MI 49048-9282

Service was made by U.S. regular mail, postage prepaid. The Respondent's Answer was filed electronically by using the Agency's E-filing system and an original and four copies were hand delivered to the National Labor Relations Board at 110 Michigan St NW, Grand Rapids, MI 49503 on December 12, 2014.

I declare that the statements above are true to the best of my information, knowledge and belief.

MILLER JOHNSON

Attorneys for Respondent

Dated: December 12, 2014

By Keith E. Eastland (By AC)
David M. Buday
Keith E. Eastland

Business Address:
250 Monroe Avenue NW, Suite 800
P.O. Box 306
Grand Rapids, Michigan 49501-0306
Telephone: (616) 831-1700

EXHIBIT 3

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D C.

ALLIED MECHANICAL SERVICES, INC.

and

PLUMBERS AND PIPE FITTERS LOCAL 357,
UNITED ASSOCIATION OF JOURNEYMAN
AND APPRENTICES OF THE PLUMBING AND
PIPE FITTING INDUSTRY OF THE UNITED
STATES AND CANADA, AFL-CIO

Cases GR-7-CA-40907
GR-7-CA-41390

COUNSEL FOR GENERAL COUNSEL'S EXCEPTIONS TO
THE DECISION AND RECOMMENDED
ORDER OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 of the Board's Rules and Regulations Counsel for General Counsel hereby excepts to the following findings and conclusions of Administrative Law Judge David Evans in the Decision and Recommended Order which issued on February 8, 2000.

1. Counsel for General Counsel excepts to the Administrative Law Judge's failure to find that the strikes which began on December 26, 1996, and July 25, 1997, were unfair labor practice strikes, and his failure to further find that the striking employees were unfair labor practice strikers entitled to immediate reinstatement upon their unconditional offers to return to work.
[ALJD at p. 17, lines 33-54]

2. Counsel for General Counsel excepts to the Administrative Law Judge's refusal to rely on the findings in the Decision And Recommended Order of ALJ Richard Beddow which was introduced at the hearing, and is presently pending before the Board, as evidence of the unfair labor practices that helped to cause or prolong the strikes which began on December 26, 1996, and July 25, 1997. [ALJD at p. 17, lines 36-45]

3. Counsel for General Counsel excepts to the Administrative Law Judge's refusal to conclude that the July 25 strike, which he found in part was caused by failure to pay the discriminatees backpay pursuant to the Enforcement Decree of the Sixth Circuit Court of Appeals, was an unfair labor practice strike, based on his findings that Counsel for General Counsel offered no evidence that the discriminatees were entitled to backpay. Counsel for General Counsel also excepts to his findings that the record established that the Union kept these discriminatees constantly employed during the backpay period, and his finding that they may not have been entitled to any backpay. [ALJD at p. 17, lines 45-54] His findings in this regard are contrary to the undisputed evidence on the record, and to established Board law.

4. Counsel for General Counsel excepts to the Administrative Law Judge's failure to find that the July 25 strike, which he found was caused in part by Respondent's unilateral implementation of a mileage reimbursement policy and by its refusal to provide the Union with information, was an unfair labor practice strike based on his conclusion that the Respondent had no duty to bargain with Local 337 during this period of time. [ALJD at p. 17, lines 43-38]

5. Counsel for General Counsel excepts the Administrative Law Judge's failure to find that Local 337, and its successor Local 357, is and has been at all material times, the Section 9(a)

majority representative of the employees in the unit. [ALJD at p. 13, lines 29-47; p. 14 all, p. 15, lines 36-38]

6. Counsel for General Counsel excepts to the Administrative Law Judge's failure to find that the settlement agreement that was entered into in September 1991 established a Section 9(a) relationship and excepts to his finding that the parties only intended to create a Section 8(f) relationship. [ALJD at p. 13, lines 29-47; p. 14 all, p. 15, lines 36-38]

7. Counsel for General Counsel excepts to the Administrative Law Judge's finding to the effect that the 1991 settlement did not establish a Section 9(a) relationship because the bargaining order set forth in that settlement sought only to remedy Section 8(a)(1) and (3) allegations, and not Section 8(a)(1) and (5) refusal to bargain allegations. [ALJD at p. 14, lines 2-17]

8. Counsel for General Counsel excepts to the Administrative Law Judge's findings to the effect that Respondent was privileged to withdraw recognition from the Union because the Union, or its predecessor Local 337, was never the Section 9(a) representative of the Unit. [ALJD at p. 15, lines 8-15]

9. Counsel for General Counsel excepts to the Administrative Law Judge's finding to the effect that Counsel for General Counsel argued on brief that once the settlement agreement was entered into, Respondent was privileged to withdraw recognition after a reasonable period of time. [ALJD at p. 14, lines 17-45 and fn. 15] In fact, the position that Counsel for General Counsel expressed was that once the settlement agreement was entered into establishing 9(a) status, the Union was entitled to an irrebuttable presumption of majority support for a reasonable period of time, and the Union's majority status could not be challenged and recognition could not

be withdrawn during that period. Counsel for General Counsel further argued that following the expiration of the reasonable period of time, the Section 9(a) representative was entitled to a presumption of continued majority support.

10. Counsel for General Counsel excepts to the Administrative Law Judge's failure to find that Respondent never established by probative evidence that it had a good faith doubt as to the Union's continued majority status. [ALJD at pp. 13-15]

11. Counsel for General Counsel excepts to the Administrative Law Judge's failure to find that Local 357 is the successor of Local 337, and further failure to find that Local 357 became the Section 9(a) representative of the Unit. [ALJD at p. 15, lines 40-43; p. 17, lines 2-5]

12. Counsel for General Counsel excepts to the Administrative Law Judge's failure to find that there was a substantial continuity of collective bargaining representative following the consolidation of Local 337 and Local 513, which resulted in the formation of Local 357. [ALJD at p. 16, lines 35-42]

13. Counsel for General Counsel excepts to Administrative Law Judge's failure to find that Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union. [ALJD at p. 16, lines 35-42]

14. Counsel for General Counsel excepts to the Administrative Law Judge's failure to find that Respondent violated Section 8(a)(1) and (5) of the Act by failing to provide the Union with requested, relevant information, and by making unilateral changes in its application procedure without giving the Union notice or opportunity to bargain. [ALJD at p. 17, lines 7-17]

15. Counsel for General Counsel excepts the Administrative Law Judge's failure to find that Local 357 is a labor organization within the meaning of Section 2(5) of the Act, and to his

conclusion that employees do not participate in that organization by virtue of the fact that it is under the trusteeship of the International Union. [ALJD at p. 8, lines 33-38]

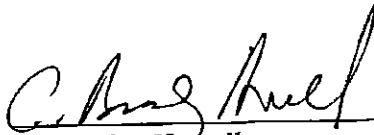
16. Counsel for General Counsel excepts to the Administrative Law Judge's finding that the changes in the application policy that Respondent implemented on August 1, 1998, were not implemented to discourage union membership in violation of Section 8(a)(1) and (3) of the Act, and further excepts to his dismissal of this allegation. The evidence establishes a prima facie case that the policy was implemented out of anti-union animus in order to screen out union applicants, in violation of Section 8(a)(1) and (3) of the Act. [ALJD at p. 53, lines 29-30; p. 54, lines 1-7]

17. Counsel for General Counsel excepts to the Administrative Law Judge's dismissal of the allegation that Respondent unlawfully refused to hire or consider for hire discriminatees Grant Maichele, Tom Patterson, Jeffrey Warren, and Ron Wood, in violation of Section 8(a)(1) and (3) of the Act. Counsel for General Counsel excepts to the Administrative Law Judge's finding that Respondent was privileged to refuse to hire them or consider them for hire because they failed to fill out Company- provided applications at Respondent's place of business, inasmuch as the policy was implemented out of anti-union animus, and it was disparately enforced. Counsel for General Counsel also excepts to the Administrative Law Judge's finding that the policy was not shown to be more onerous for union applicants. Counsel for General Counsel excepts to the Administrative Law Judges finding to the effect that it is not significant that nonunion applicants were allowed to make appointments at different times and locations to complete such applications, because these discriminatees never asked for such accommodations, inasmuch as Respondent never told them they could make such appointments, and the letters sent

to these discriminatees indicated that they had to appear at Respondent's offices in Kalamazoo.

[ALJD at p. 53, lines 29-30; p. 54, lines 1-7]

Respectfully submitted this 10th day of April 2000.

A handwritten signature in black ink, appearing to read "A. Bradley Howell".

A. Bradley Howell
Counsel for General Counsel
National Labor Relations Board
Region Seven
Grand Rapids Resident Office
82 Ionia NW, Room 330
Grand Rapids, Michigan 49503
(616) 456-2571

EXHIBIT 4

October 10, 2012

VIA EMAIL, ANNETTA.STEVENSON@NLRB.GOV
AND U.S. MAIL

Ms. Annetta Stevenson
National Labor Relations Board, Region 7
477 Michigan Avenue, Room 300
Detroit, MI 48226-2543

Re: Application of *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (2007)
Allied Mechanical Services, Inc.:
Case Nos. GR-7-CA-38022, GR-7-CA-38204, GR-7-CA-38440,
GR-7-CA-38881, GR-7-CA-39213, GR-7-CA-39872, GR 7-CA-40907,
and GR-7-41390

Dear Ms. Stevenson:

This letter follows our recent telephone discussion. Before discussing the issues, please note that on September 25, 2012, Allied Mechanical Services ("AMS") provided Terri Jo Conroy with an unconditional offer of employment. A copy of that written offer is attached. (See **Attachment 1**). Also, AMS has indicated that it will have financial information for comparable employees to the Region no later than December 1, 2012.

During our discussion we briefly discussed the application of *Oil Capitol Sheet Metal* to the discriminantees in the above cases. As detailed below, all of the returning strikers in these cases were paid "salts," triggering the Board's compliance rule set forth in *Oil Capitol*. The Board has found that all of the strikers in these cases were paid salts and/or the Union has admitted this fact in the underlying proceedings.

1. ***Oil Capitol Sheet Metal, Inc.***

A. **General Rule**

Many of the remedial issues in these compliance proceedings will be controlled by the Board's decision in *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (2007). Under *Oil Capitol*, the General Counsel bears the burden to prove, by affirmative evidence, the length of a salt's backpay period. *Id.* at *2; see also GC Memo (OM) 08-29 at p. 2 (2008) ("[T]he General Counsel must now affirmatively prove that salting discriminantees would have worked the entire backpay period alleged in the compliance specification.").

MILLER JOHNSON

Ms. Annetta Stevenson
National Labor Relations Board, Region 7
October 10, 2012
Page 2

Such evidence “may include, but is not limited to, the salt/discriminatee’s personal circumstances, contemporaneous union policies and practices with respect to salting campaigns, specific plans for the targeted employer, instructions or agreements between the salt/discriminate and union concerning the anticipated duration of the assignment, and historical data regarding the duration of employment of the salt/discriminate and other salts in similar salting campaigns.” *Id.* at *2. The Board may also look to the average duration of employment of the discriminatees in prior salting efforts in examining the proper length of any backpay period. NLRB Compliance Manual § 10542.9.

In addition, reinstatement for a salt is permissible under *Oil Capitol* only if the General Counsel can prove that the discriminatee would still be employed. *Id.* at *7 and n.28; GC Memo 08-29 at p. 2 (“[A] salting discriminatee’s right to instatement is defeasible if the General Counsel fails to carry his burden of proving that the discriminatee would still be employed but for the employer’s discrimination.”).

B. *Oil Capitol* Applies Retroactively

In *Oil Capitol* the Board held that it would “apply this new evidentiary requirement in the present case and all cases where the discriminate is a union salt.” *Oil Capitol*, 349 NLRB at *2. Subsequent decisions have confirmed that this rule applies retroactively to cases where the underlying unfair labor practices were litigated prior to the 2007 decision. *Flour Daniel, Inc.*, 353 NLRB No. 15 (2008); *McBurney Corp.*, 352 NLRB 241, 242 (2008) (explaining that “the Board has routinely applied *Oil Capitol* in appropriate cases, all of which were instituted well before *Oil Capitol* was decided,” and rejecting an argument that *Oil Capitol* should not apply to a case originally litigated in 1998).

C. Who is a Salt?

The Board has broadly defined salts to include paid or unpaid employees who work for an employer while also working for the union with the objective of assisting in a salting campaign. Salts are usually paid, and are controlled by the union. Salts can be existing employees or applicants. Although the goal of a salting campaign is typically to organize employees, this need not be the case. For example, a salting campaign may be designed to induce employers into committing unfair labor practices to give the union leverage at the table or in an organizing drive. As the *Oil Capitol* Board explained:

A salting campaign’s immediate objective may not always be organizational. See, e.g., *Harman Brothers Heating & Air Conditioning v. NLRB*, 280 F.3d 1110, 1112 (7th Cir.

MILLER JOHNSON

Ms. Annetta Stevenson
National Labor Relations Board, Region 7
October 10, 2012
Page 3

2002) (noting that true objective of union salting campaigns often is “to precipitate the commission of unfair labor practices by startled employer”), and *Starcon, Inc. v. NLRB*, 176 F.3d 948, 949 (7th Cir. 1999) (noting that salts’ “proximate aim, in this case as commonly, is to precipitate an unfair labor practice proceeding that will result in heavy backpay costs to the employer . . .”).

Oil Capitol, 349 NLRB No. 118 at n.5.

2. The Strikers/Discriminatees in These Proceedings Were Salts

There are two groups of strikers/discriminatees at issue in this matter. Both groups comprise paid salts. The first group is from the Board’s 2004 decision and the second is from the Board’s 2001 decision.

A. Group 1: The Board’s 2004 Decision

The first group includes the following ten (10) individuals: Jim Bronkhorst, Ken Falk, Ted Fuller, Jón Kinney, Grant Maichele, Marty Preston, Tobin Rees, Max Roggow, Brian Rowden, and Steve Titus. The Board ordered these striking employees reinstated in *Allied Mechanical Servs.*, 341 NLRB 1084 (2004) (Case Nos. 7-CA-40907 and 7-CA-41390).

In concluding that AMS improperly failed to reinstate these striking employees, there was no dispute that all ten were salts. All ten were paid by the union in connection with its salting campaign, all were subject to the union’s control, and all had agreements to go on strike (and to return) whenever the union told them to do so. *Id.* at 1095. On these facts, the ALJ found it “undisputed that all of the ten unreinstated strikers, were at the time that they went on strike, being paid by Local 337 (or one of the other Michigan UA locals) to assist in organizing the Respondent’s employees and were therefore ‘salts,’ as that term is commonly used in labor relations law.” *Id.* at 1095. Later in his decision, which was affirmed by the Board, the ALJ reiterated his conclusion that all ten strikers were “salts,” stating: “It is true that the 10 strikers were paid, and paid well, to be salts.” *Id.* at 1101 (emphasis added). The Union did not dispute and cannot now contest these findings.

B. Group 2: The Board’s 2001 Decision

The second group of strikers included the following six (6) individuals: Todd Hayes, Jeff Kiss, Mark Lemmer, Ron Parlin, Jeff Warren, and Kirk Wood. The Board ordered

MILLER JOHNSON

Ms. Annetta Stevenson
National Labor Relations Board, Region 7
October 10, 2012
Page 4

these striking employees reinstated in *Allied Mechanical Servs.*, 332 NLRB 1601 (2001) (Case Nos. 7-CA-38022, 7-CA-38204, 7-CA-38440, 7-CA-38881, 7-CA-39213, and 7-CA-39872).

These individuals were also paid salts. Indeed, there is unequivocal testimony establishing this fact. UA Organizer David Knapp testified as follows:

Q. Did you use the word "Salt" in your affidavit when discussing some of these individuals?

A. I believe so, yes. Yes.

Q. Maybe I was confused.

A. Okay.

Q. I read that over the break. You referred, for example, to the individuals who participated in the strikes in the spring and summer of 1996 as salts, isn't that correct?

A. Correct.

Q. Could you define for me what you mean by a "salt"?

A. Someone that's compensated [by the union] while they're working for the contractor even though they are an employee of the contractor.

Q. And do all of these people fall under that category?

[UNION COUNSEL] All what people?

Q. All the six people who went on strike during the summer of 1996.

A. **Were they all salts? Yes.**

(Attachment 2, 2/13/97 Hearing Transcript p. 339 (emphasis added).)

MILLER JOHNSON

Ms. Annetta Stevenson
National Labor Relations Board, Region 7
October 10, 2012
Page 5

This testimony is further buttressed by the Union's admission to the Board that these individuals made a "decision to act as paid organizers or "salts." (**Attachment 3**, 4/3/98 Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge, p. 5-6.)¹

C. The Issue of Salts as Statutory Employees is Irrelevant

AMS previously argued that the strikers' conduct was unprotected and that, as "salts," they were not entitled to be considered employees under the Act. That argument was unsuccessful. *E.g.*, *Allied Mechanical Servs.*, 341 NLRB at 1101; *Allied Mechanical Servs., Inc.*, 320 NLRB at n.3. However, whether salts are entitled to statutory protection as employees under Section 2 of the Act bears no impact on whether they can be reinstated or the length of their backpay periods under *Oil Capitol*.

3. **The UA's Salting Campaign Confirms that the Backpay Periods Must be Significantly Short and that Reinstatement is Not Appropriate**

AMS believes that the Region's compliance investigation will confirm that there is no affirmative evidence sufficient to satisfy the General Counsel's *Oil Capitol* burden. Reinstatement would not be proper even if any of these individuals had a desire to work for AMS, and any alleged backpay period should be significantly limited based on the undisputed facts and discriminatees' status as salts.

The Board will look to the following types of evidence in fixing a backpay period for salts: (1) the discriminatees' personal circumstances; (2) contemporaneous union policies and practices on salting; (3) specific union plans for the targeted employer; (4) instructions and agreements between the discriminatees and the union on the duration of the assignment; and (5) historical data regarding the duration of employment of the discriminatees.

¹ There is a third group of four discriminatees related to the refusal to hire claims in the Board's 2004 decision. Those are Scott Calhoun, Terri Jo Conroy, Harold Hill, and Jeff Kiss. Mr. Calhoun is deceased, AMS has offered Ms. Conroy reinstatement to an equivalent position, Mr. Kiss resigned his employment with AMS after being reinstated, and both Mr. Kiss and Mr. Hill were salts.

MILLER JOHNSON

Ms. Annetta Stevenson
National Labor Relations Board, Region 7
October 10, 2012
Page 6

All of these factors will weigh heavily against any claim for reinstatement or an extended backpay period.² A summary of the UA's salting campaign against AMS since the early 1990s helps put this issue in its proper context and illustrates how the discriminatees engaged in repeated salting efforts, at the union's direction, with no real interest in working for AMS. Examining the UA's salting campaign shows that these individuals went on strike for extended periods as directed by the Union, only to return for a few days or weeks and then to call another strike. The Union directed these intermittent strikes and provided alternative employment. Indeed, most, if not all, of the discriminatees secured other regular and better paying employment while out on strike or during the periods when they were not returned to work. Simply put, many of the individual discriminatees would return to work only because they were directed to return by the union and they had no intention of actually earning a paycheck or pursuing a career with AMS. As one salt testified (Jon Kinney), he was never without work and he received higher pay and better benefits during these periods of strike and he only agreed to return to AMS because he was a paid salt and the union required him to do so. *Allied Mechanical Servs.*, 341 NLRB at 1095. Not surprisingly, upon reinstatement or returning to work, these salts would, at the union's direction, immediately go out on strike again and go back to work for other employers. *Id.*

A. The Union's Pattern of Calling Intermittent Strikes With Its Paid Salts

i. The 1992 and 1993 Strikes

The Union's salting campaign and attempts to organize AMS's plumbers and pipefitters date back to the mid-1980s. In 1985, when it first began operations, AMS voluntarily agreed to a Section 8(f) bargaining relationship with the UA Local 337. In 1986, after it became clear that a multi-employer 8(f) agreement would not include the terms important to the company, AMS elected to end its 8(f) relationship with the UA. The Union then attempted to organize AMS's employees. Within a year, a Board election was held and the employees voted to reject Local 337.

After losing the Board election in 1986, the UA renewed its attempts to organize AMS's employees beginning in 1990. The UA filed various ULP charges in 1990, which ultimately led to the July 30, 1991 Settlement Agreement. However, the Union continued its salting campaign by calling strikes in 1992 and 1993. The Union directed its salts to commence two strikes in 1992 and one in 1993.

² These arguments are made in addition to all others that AMS has, including but not limited to those based on AMS's unconditional offers to return to work that have been rejected by individuals.

MILLER JOHNSON

Ms. Annetta Stevenson
National Labor Relations Board, Region 7
October 10, 2012
Page 7

The first strike occurred on July 20, 1992 when the following 12 employees went out: Thomas Amyx, Harold Hill, Gil Ragsdale, James Bronkurst, Grant Maichele, Max Roggow, Ken Falk, John Powers, Brian Rowden, Ted Fuller, Marty Preston, and Steve Titus. It soon became apparent that the Union would call these strikes intermittently in an effort to precipitate the commission of unfair labor practices by the employer and/or to pressure AMS as it related to negotiations.

The Board found that these 12 employees "were the nucleus of the Union's support and received a monetary stipend from the Union for engaging organizational activity among [AMS's] other employees." *Allied Mechanical Servs.*, 320 NLRB 32, 36-37 (1995). AMS returned 10 of these 12 strikers to work on September 8, 1992 following their unconditional offer to return. The other two were returned to work a few weeks later on October 19, 1992. *Id.*

The returning salts didn't work for long. They commenced a second strike within weeks of returning. On October 16, 1992, the Union directed the following salts to go on strike in protest of alleged ULPs: Steve Titus, Grant Maichele, Harold Hill, Mac Ragnow, Gil Ragsdale, and Ted Fuller. *Id.* at 37. These individuals offered to return to work on November 10, 1992, but AMS did not believe that they had a right to return and did not allow them to do so. The Union directed another group of four salts to strike beginning on June 24, 1993. 320 NLRB at 37-38. These individuals included: Jim Bronkhorst, Ken Falk, Marty Preston, and Brian Rowden. On July 6, 1993, the Union sent a letter to AMS making an offer to return to work on behalf of the June 24 strikers. Again, AMS refused this offer.

The Union alleged that the refusals to reinstate the striking salts violated Section 8(a)(3) of the Act, and the Board resolved this dispute on December 18, 1995 and directed AMS to reinstate nine of these individuals. AMS appealed to the Sixth Circuit Court of Appeals. *Id.*; *Allied Mechanical Servs., Inc. v. NLRB*, 113 F.3d 623 (6th Cir. 1997). On July 9, 1997, the Court enforced the Board's order to reinstate nine of the striking salts: Jim Bronkhorst, Ken Falk, Ted Fuller, Harold Hill, Grant Maichele, Marty Preston, Mac Ragnow, Brian Rowden, and Steve Titus. AMS immediately offered reinstatement to these nine individuals that same day. *Allied Mechanical Servs.*, 341 NLRB at 1092. Eight of the nine salts agreed to return. All but Harold Hill accepted. *Id.* at 1092.

ii. The 1996 and 1997 Strikes

Notably, these eight returning salts did not last long and it became evident that they had no real interest in working for AMS on any basis other than to further the UA's salting campaign. This is confirmed by the fact that, within two weeks of being offered their jobs back,

MILLER JOHNSON

Ms. Annetta Stevenson
National Labor Relations Board, Region 7
October 10, 2012
Page 8

these employees immediately went out on strike again. After fighting for years to secure reinstatement, the employees didn't bother to work for more than a few days. Why would they? They were working for other unionized contractors and receiving higher pay and what they viewed as better benefits.

By letter dated July 23, 1997, the Union informed AMS that the freshly reinstated salts Fuller, Maichele, Roggow, Titus, Bronkhorst, Falk, Preston, and Rowden were again on strike. *Id.* at 1092. The Union made an offer for these strikers to return months later on March 2, 1998. It is undisputed that the Union controlled the decision on when these paid salts would offer to return and the Union provided these individuals with equivalent, if not better, employment for unionized contractors during the periods when they did not work for AMS. *Id.* at 1094-95.

Meanwhile, the Union had also directed eight other salts to strike in 1996. Todd Hayes and Kirk Wood went out on strike on May 28, 1996. Ron Parlin and Jeff Warren joined them beginning on June 12, 1996, followed by Jeff Kiss and Brian Lemmer on July 1, 1996. *Allied Mechanical Servs.*, 332 NLRB at 1605-06. These six individuals offered to return to work on September 16, 1996, but AMS did not agree that they had a right to do so. This dispute was litigated and resolved by the Board on January 5, 2001. *Id.* The Board has ordered these six individuals should be reinstated. This is the second group of striking salts discussed above.

The remaining two striking salts, Jon Kinney and Tobin Rees, commenced their strike on December 23, 1996. They remained out on strike until the Union's March 2, 1998 offer to return. They, like the eight striking salts reinstated in July 1997 were not returned to work. The Board resolved this dispute on May 28, 2004, ordering AMS to reinstate the 10 striking salts. 341 NLRB at 1084. This is the second group of striking salts discussed above.

iii. Additional Refusals to Accept Unconditional Offers to Return to Work and/or Changed Circumstances Weighing Against Reinstatement and Extended Backpay Periods

That these individuals had no interest in working for AMS after electing to become salts is further confirmed by their subsequent refusals to accept AMS's unconditional offers to return to work issued in 1999, 2001, and 2002. AMS detailed these unconditional offers in its July 17, 2006 letter sent to Compliance Officer Mark Baines in connection with prior settlement efforts with the Region. The following is summary of those offers.

- James Bronkhorst. Mr. Bronkhorst was one of ten strikers/salts ordered reinstated following an offer to end his strike and return to work on

March 2, 1998. AMS offered Mr. Bronkhorst full and unconditional reinstatement to his position in the plumbing and pipefitting unit in a written letter on May 16, 2001. AMS informed Mr. Bronkhorst that it was planning for him to return to work on May 30, 2001 and instructed him to contact AMS with "any questions regarding any aspect of [the] offer of reinstatement." AMS sent the offer letter by regular and certified mail on May 16, 2001. AMS also telephoned and left a message for Mr. Bronkhorst. Mr. Bronkhorst failed to respond or to report to work.

- Ken Falk. Ken Falk was one of ten strikers/salts ordered reinstated following an offer to return to work on March 2, 1998. AMS offered Mr. Falk full and unconditional reinstatement on November 2, 2001. AMS informed Mr. Falk that it was planning for him to return to work on November 14, 2001, and instructed him to contact AMS with "any questions regarding any aspect of [the] offer of reinstatement." Mr. Falk responded to the unconditional offer and returned to work on November 14, 2001. He subsequently went on strike again on May 31, 2002 and has never returned to work.
- Ted Fuller. Ted Fuller was one of ten strikers/salts ordered reinstated following an offer to return to work on March 2, 1998. AMS offered Mr. Fuller full and unconditional reinstatement on September 15, 1999. AMS informed Mr. Fuller that it was planning for him to return to work on September 22, 1999, and instructed him to contact AMS with "any questions regarding any aspect of [the] offer of reinstatement." Mr. Fuller responded to the unconditional offer and returned to work on or about September 22, 1999 before later ending his employment.
- Todd Hayes. Todd Hayes was one of six strikers/salts ordered reinstated following an offer to return to work on September 16, 1996. AMS offered Mr. Hayes full and unconditional reinstatement on November 14, 2001. AMS sent a letter to Mr. Hayes on November 14 and informed him that it was planning for his return to work on November 26, 2001. AMS also instructed him to contact AMS with "any questions regarding any aspect of [the] offer of reinstatement." After Mr. Hayes failed to respond or report for work, AMS identified another address for Mr. Hayes and sent another offer letter to him. These additional efforts to contact Mr. Hayes also proved unsuccessful. Mr. Hayes failed to respond or report following AMS's offer of unconditional reinstatement.

MILLER JOHNSON

Ms. Annetta Stevenson
National Labor Relations Board, Region 7
October 10, 2012
Page 10

- Jeff Kiss. Jeff Kiss was one of six strikers/salts ordered reinstated following an offer to return to work on September 16, 1996. AMS offered Mr. Kiss full and unconditional reinstatement on November 14, 2001. Mr. Kiss responded to the unconditional offer and returned to work for AMS on November 26, 2001. He, however, also went on strike on November 27, 2001 and voluntarily resigned on July 13, 2004.
- Jon Kinney. Jon Kinney was one of ten strikers/salts ordered reinstated following an offer to return to work on March 2, 1998. AMS offered Mr. Kinney full and unconditional reinstatement on July 25, 2002. AMS sent a letter to Mr. Kinney and informed him that it was planning for him to return to work on August 12, 2002. AMS also instructed him to contact the company with "any questions regarding any aspect of [the] offer of reinstatement." Mr. Kinney failed to report or respond to the unconditional offer of reinstatement.
- Mark Lemmer. Mark Lemmer was one of six strikers/salts ordered reinstated following an offer to return to work on September 16, 1996. Mr. Lemmer voluntarily ended his employment with AMS on November 11, 1997.
- Grant Maichele. Grant Maichele was one of ten strikers/salts ordered reinstated following an offer to return to work on March 2, 1998. Mr. Maichele responded to AMS's unconditional offer of reinstatement and returned to work on July 12, 2001. Mr. Maichele subsequently went out on strike again on November 9, 2001 and has never returned.
- Ron Parlin. Ron Parlin was one of six strikers/salts ordered reinstated following an offer to return to work on September 16, 1996. AMS offered Mr. Parlin full and unconditional reinstatement on October 15, 2001. AMS informed Mr. Parlin that it was planning for his return to work on October 24, 2001, and instructed him to contact AMS with "any questions regarding any aspect of [the] offer of reinstatement." Mr. Parlin failed to respond or to report for work on October 24, 2001. Indeed, on November 9, 2001, Mr. Parlin acknowledged that his employment with AMS had ended on October 24, 2001 when he requested a benefit distribution.

MILLER JOHNSON

Ms. Annetta Stevenson
National Labor Relations Board, Region 7
October 10, 2012
Page 11

- Martin Preston. Martin Preston was one of ten strikers/salts ordered reinstated following an offer to return to work on March 2, 1998. AMS offered full and unconditional reinstatement to Mr. Preston on November 27, 2001. Mr. Preston was expected to respond or report to work by December 5, 2001 and was instructed to call AMS if he had "any questions regarding any aspect" of the offer of recall and reinstatement. The Union responded on behalf of Mr. Preston by faxing correspondence to AMS on December 5, 2001, advising AMS that Mr. Preston could not work until December 17, 2001.
- Tobin Rees. Tobin Rees was one of ten strikers/salts ordered reinstated following an offer to return to work on March 2, 1998. AMS offered Mr. Rees full and unconditional reinstatement on March 25, 2002. AMS sent a letter to Mr. Rees and informed him that it was planning for his return to work on March 25, 2002. AMS instructed him to contact the company with "any questions regarding any aspect of [the] offer of reinstatement." Mr. Rees failed to report or respond to the unconditional offer of reinstatement.
- Max Roggow. Max Roggow was one of ten strikers/salts ordered reinstated following an offer to return to work on March 2, 1998. AMS offered Mr. Roggow full and unconditional reinstatement on December 6, 2001. AMS sent three notices to Mr. Roggow's record address and informed him that it was planning for his return to work on December 17, 2001 and instructed him to contact AMS with "any questions regarding any aspect of [the] offer of reinstatement." Mr. Roggow failed to report or respond to the unconditional offer of reinstatement.
- Brian Rowden. Brian Rowden was one of ten strikers/salts ordered reinstated following an offer to return to work on March 2, 1998. Mr. Rowden responded and returned to work on September 22, 1999 before later ending his employment.
- Steve Titus. Steve Titus was also one of the ten strikers/salts ordered reinstated following an offer to return to work on March 2, 1998. Mr. Titus returned to work on June 14, 2001 before he was later discharged for unrelated lawful reasons. Mr. Titus has since passed away.

MILLER JOHNSON

Ms. Annetta Stevenson
National Labor Relations Board, Region 7
October 10, 2012
Page 12

- Jeff Warren. Jeff Warren was one of six strikers/salts ordered reinstated following an offer to return to work on September 16, 1996. AMS offered Mr. Warren full and unconditional reinstatement on December 6, 2001. AMS informed Mr. Warren that it was planning for his return to work on December 17, 2001 and instructed him to contact AMS with "any questions regarding any aspect of [the] offer of reinstatement." Mr. Warren responded and contacted AMS on December 14, 2001, informing the company that his wife was scheduled for delivery the week of December 17, 2001. AMS then rescheduled his return date based on his prompt response to its unconditional offer, allowing Mr. Warren to return on December 27, 2001. Mr. Warren, however, went on strike the very next day, December 28, 2001.
- Kirk Wood. Kirk Wood was one of six strikers/salts ordered reinstated following a September 16, 1996 offer to return to work. Mr. Wood resigned on March 3, 1998.

B. The Oil Capitol Factors

Although AMS does not have all of the information relevant to the Region's compliance investigation, many of the *Oil Capitol* factors, established facts, and the history of the Union's salting campaign demonstrate that there is no affirmative evidence sufficient to meet the General Counsel's burdens in *Oil Capitol*.

Indeed the first, fourth, and fifth factors strongly cut against any claim for reinstatement or an extended salting back pay period. For instance, the discriminatee's personal decisions and circumstances show that they agreed to go on strike whenever the union directed, and the Union provided alternative employment for these individuals while on strike or not working for AMS. Many of these individuals personally decided not to return to work or they have resigned after being reinstated. Next, there were specific agreements between these salts and the Union which required them to go on strike and return whenever the union told them to do so. Moreover, the salts repeatedly demonstrated that they had no real interest in working for AMS on a long-term basis by returning to work, only to turn around and go out on strike again within a few days or weeks. This is strong historical evidence showing that the duration of any employment for these individuals with AMS would have been extremely short because the union was providing alternative employment that, as confirmed by Mr. Kinney's testimony, was more desirable to the salts.

MILLER JOHNSON

Ms. Annetta Stevenson
National Labor Relations Board, Region 7
October 10, 2012
Page 13

4. **Mitigation Under *Contractor Servs.*, 351 NLRB No. 4 (2007)**

AMS also notes that the Board's decision in *Contractor Servs.*, 351 NLRB No. 4 (2007) may apply in this matter. In *Contractor Servs.*, the Board held that a paid union organizer failed to properly mitigate his loss of earnings during the backpay period by limiting his job search to non-union employers. Here, the record establishes that most, if not all, of the discriminatees were employed by other union contractors during their strike or when they were not returned to work. *Allied Mechanical Servs.*, 341 NLRB at 1095. On these facts, these employees were likely to have fully mitigated any alleged backpay. However, to the extent that they did not work for other union contractors, it was likely because they were limiting their job searches to non-union employers to further their role and activities as paid salts. In these circumstances, an individual fails to mitigate damages under NLRB law.

5. **Conclusion**

For the reasons set forth above, AMS believes that reinstatement is not appropriate under *Oil Capitol* and that any asserted backpay period should be significantly limited based on the Union's salting campaign. Indeed, an appropriate backpay period should not exceed more than several months. *E.g., Jeffs Electric, LLC*, 2007 WL 2735680 (ALJ Davis Sep. 17, 2007) (five-month salting period appropriate).

Please contact me with any questions, and let us know if there is any additional information that you would like from AMS.

Sincerely,

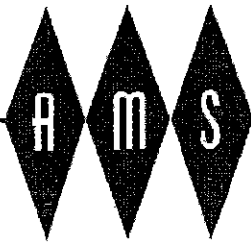
MILLER JOHNSON

By

David M. Buday

dmb/kee/tlc
3 attachments
c w/o encls: Allied Mechanical Services, Inc.

ATTACHMENT 1



ALLIED MECHANICAL SERVICES, INC.

PLUMBING — HEATING — AIR CONDITIONING — SHEET METAL — PROCESS PIPING

September 26, 2012

COPY

Terri Jo Conroy
17 Hidden Lane
Apt. 1B
Battle Creek, MI 49017-4554

VIA CERTIFIED MAIL

Re: Unconditional Offer of Employment/Instatement

Dear Ms. Conroy:

We are writing to offer you employment with Allied Mechanical Services, Inc. (AMS). By this letter, AMS offers you full and unconditional instatement to a plumber/pipefitter apprentice position with the Company—the equivalent position for which you previously applied in July 1998.


The starting hourly wage rate would be \$11.00 and your benefit package would be the same as applies to similar employees in the unit and according to company policies. Benefits for our employees generally include health insurance, retirement benefits, vacation as earned, etc.

If you accept this offer, we would like for you to begin work on October 16, 2012 but wish to give you time to consider this offer and to provide notice to your current employer and make arrangements to accept if necessary.

We realize that much has changed since 1998. Accordingly, please contact us as soon as possible with any questions and let us know, no later than October 10, 2012, whether you have any interest in working for AMS. If we do not hear anything from you by then, we will assume that you are satisfied with your current situation and have no interest in employment at AMS.

If you have any questions regarding any aspect of this offer, please direct Mr. Marty DeJong at 269-344-0191 so we can clear them up promptly.

Sincerely,


John Huizinga
President

ATTACHMENT 2

Transcript of Proceedings

Before the

NATIONAL LABOR RELATIONS BOARD

- - - - -X
In the Matter of: :
ALLIED MECHANICAL SERVICES, INC., :
Respondent, :
-and- : Case Nos. GR-7-CA-38022
PLUMBERS AND PIPEFITTERS LOCAL 337, :
UNITED ASSOCIATION OF JOURNEYMEN :
AND APPRENTICES OF THE PLUMBING AND :
PIPEFITTING INDUSTRY OF THE UNITED :
STATES AND CANADA, AFL-CIO, :
Charging Party.:
- - - - -X
VOLUME: III

DATE: February 13, 1997
PLACE: Grand Rapids, Michigan
PAGES: 256 - 444

Capital Hill Reporting

Official Reporters
1825 K Street, N.W.
Washington, D.C. 20006
(202) 466-9500

1 Could you define for me what is a salt?

2 A I don't think I used the word "salt."

3 Q Have you ever used that word before in connection with
4 employees?

5 A Oh, yeah. I've used "salt" and so forth.

6 Q Did you use the word "Salt" in your affidavit when
7 discussing some of these individuals?

8 A I believe so, yes. Yes.

9 Q Maybe I was confused.

10 A Okay.

11 Q I read that over the break.

12 You referred, for example, to the individuals who
13 participated in the strikes in the spring and summer of 1996 as
14 salts, isn't that correct?

15 A Correct.

16 Q Could you define for me what you mean by a "salt"?

17 A Someone that's compensated while they're working for the
18 contractor even though they are an employee of the contractor.

19 Q And do all these people fall under that category?

20 MS. PAPPAS: All what people?

21 MR. SMITH: All the six people who went on strike during
22 the summer of 1996.

23 THE WITNESS: Were they all salts? Yes.

24 Q BY MR. SMITH: Were they all paid by Local 337 as salts?

25 A They --

ATTACHMENT 3

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

ALLIED MECHANICAL SERVICES, INC.

Respondent,

AND

PLUMBERS AND PIPE FITTERS LOCAL 337,
UNITED ASSOCIATION OF JOURNEYMEN AND
APPRENTICES OF THE PLUMBING AND PIPE
FITTING INDUSTRY OF THE UNITED
STATES AND CANADA, AFL-CIO

CASE NOS. GR-7-CA-38022
GR-7-CA-38204
GR-7-CA-38440
GR-7-CA-38881
GR-7-CA-39213
GR-7-CA-39872

Charging Party.

CHARGING PARTY PLUMBERS AND PIPE FITTERS LOCAL 337'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE

ROSE, WEBER & PAPPAS
By: Tinamarie Pappas
Attorneys for Charging Party
Plumbers Local 337
216 East Huron Street
Ann Arbor, MI 48104
(734) 994-1300

have committed a series of unfair labor practices, including, but not limited to, the identical conduct at issue in the instant cases, i.e., refusing to reinstate to employment, nine employees who had engaged in protected strike activity, following their unconditional offers to return to work. Even following the issuance of the Board's decision, Respondent continued to refuse reinstatement to the striking employees, choosing instead to further obstruct the much deserved justice due its employees by filing an appeal with the Sixth Circuit Court of Appeals. Finally, subsequent to the issuance of the Sixth Circuit's decision in Allied Mechanical Services, Inc. et al. v. NLRB, 113 F.3d 623 (6th Cir. 1997) which enforced the findings of the Board, Respondent offered reinstatement to the employees on July 9, 1997. [RX 41(a)-(h)].

Facts of the Cases at Bar

It is undisputed that the six employee discriminatees involved herein, namely Todd Hayes, Kirk Wood, Ron Parlin, Jeff Warren, Jeff Kiss, and Mark Lemmer, were all receiving a wage supplement from the Union at the time they engaged in their respective strike activity. (TR 339). What is most noteworthy about this fact, however, is that the amount of each employee's wage supplement was the difference between his respective wage at AMS and the contractual wage rate for his respective classification as set forth in the Union's association agreement with other area employers. (TR 605). Thus, the total wage rate being received by these employees was nothing more than the Union had secured for other members in the same industry, and obviously that which it aspired to secure for the AMS bargaining unit employees. It is also uncontroverted that the employees received no other form of monetary or non-monetary benefit from the Union beyond the stated wage supplement. (TR 342-43, 697). The Union has typically referred to these individuals collectively as union "salts". (TR 339).

The term "salt" in the context of these cases, however, is not entirely synonymous with the same term used to describe the union organizers who were the subject of the U.S. Supreme Court's decision in NLRB v. Town & Country Electric, 116 S. Ct. 450, 133 L. Ed. 2d 371 (1995). In Town & Country, the union organizer "salts" were paid union organizers who obtained employment with the company at the onset of a union organizing drive, and acted as organizers for the union during the organizing drive in an effort to persuade employees to elect the union as their collective bargaining representative. Conversely, the employees in the instant case had been employed by Respondent prior to their decision to act as paid union organizers or "salts". Upon making the decision to function in that role, the employees here sought to persuade the remaining bargaining unit employees to continue supporting the Union, which although it had already been granted recognition by Respondent, because of Respondent's continuing unfair labor practices, had been continually undermined in its status as the employees' representative, and as a result, had been unable to secure an initial contract with Respondent, despite several years of bargaining for that purpose. It is the Union's position that the union organizer/salts in the context of the instant case should be afforded even more protection under the Act than the employees functioning as salts in the Town & Country case. Indeed, the rationale behind the Union's position becomes crystal clear when the history of the relationship between this Union and this Respondent is examined. Simply put, without this protection, an employer has an equal or better chance at success in busting a union through ongoing unfair labor practices and tactics designed to undermine the union's ability to represent employees once the union has been elected or voluntarily recognized, as it has of securing the union's defeat in an initial organizing drive.

Beginning in 1995 and continuing throughout most of 1996, Union organizer David Knapp conducted weekly meetings with several of the AMS employees, most of whom were

EXHIBIT 5

June 21, 2013

VIA EMAIL AND FIRST CLASS MAIL

Mr. Mark D. Baines
Compliance Officer
National Labor Relations Board, Region 7
477 Michigan Avenue - Room 300
Detroit, MI 48226-2569

Re: Allied Mechanical Services, Inc.
Case Nos. 7-CA-40907 and 7-CA-41390
Application of *Oil Capitol Sheet Metal*

Dear Mr. Baines:

On October 10, 2012, AMS provided the Region with a letter explaining why the NLRB's decision in *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (2007) is controlling law that should be applied in these compliance proceedings involving admitted union salts. In that letter, AMS cited multiple NLRB cases which applied *Oil Capitol Sheet Metal* retroactively in compliance proceedings. *Flour Daniel, Inc.*, 353 NLRB No. 15 (2008); *McBurney Corp.*, 352 NLRB 241, 242 (2008); *Contractor Servs.*, 351 NLRB No. 4 (2007).

During our telephone discussion on June 13, 2013, you informed me that the Region (not the Acting General Counsel) had made the decision to reject *Oil Capitol Sheet Metal, Inc.*'s application in this compliance matter. The stated reasons for the Region's decision were two: (1) that all of the proceedings in AMS's case had concluded before the Board decided *Oil Capitol* in 2007; and (2) that the Board cases applying *Oil Capitol* retroactively were decided by a two-member panel of the Board that lacked a quorum to issue the decision. You confirmed for me that this decision was made at the Regional level and provided no other reasons to support this position.

1. The Region's position is wrong and ignores controlling law.

First, the Region's claim that all NLRB cases applying *Oil Capitol* retroactively were decided by two-member NLRB panels without authority is wrong. *Contractor Servs.*, 351 NLRB No. 4 (2007), a case included in AMS's October 10, 2012 letter, makes this clear.

Contractor Services was decided on September 27, 2007 by a three-member panel (Chairman Battista, Member Schaumber and Member Kirsanow). In that decision, the NLRB applied *Oil Capitol* retroactively in compliance matters after the Eleventh Circuit Court of Appeals had enforced the Board's Order in 2000. The Board decision in *Contractor Services* was issued in 1997, and it was based on conduct from 1995. The Board's Order was not

MILLER JOHNSON

Mr. Mark D. Baines
National Labor Relations Board, Region 7
June 21, 2013
Page 2

enforced until 2000—before *Oil Capitol Sheet Metal* was decided. After court enforcement, a compliance proceeding was held. The ALJ failed to apply *Oil Capitol*, and the Board reversed, concluding otherwise and remanding the case with instructions for the ALJ to apply *Oil Capitol*.

Oil Capitol Sheet Metal applies retroactively. It is controlling law, AMS's case is no different than *Contractor Services*, a three-member panel decision.

Second, the Region has no authority to ignore or alter controlling law. Regions must follow settled law. The General Counsel has repeatedly made clear that his approval is required in any case "where the Region wishes to overturn Board precedent." See, e.g., GC *Memo 11-1* at p. 2.

Third, the proceedings in AMS's case were not finished before *Oil Capitol* was decided on May 31, 2007. When the Board decided *Oil Capitol*, the AMS case remained pending. It was not until September 28, 2007 when the NLRB issued its decision to grant the General Counsel and Union's pending motions for reconsideration. Thereafter, the proceedings continued when AMS exercised its legal right to file a motion for reconsideration of the 2007 decision. That was decided by a two-member panel and the decision was vacated and the matter remanded. A final Board decision did not issue until October 14, 2010—more than three years after *Oil Capitol* was decided.

2. Conclusion

The Region's refusal to apply *Oil Capitol* should be corrected immediately.

The Region's refusal to follow settled law or to conduct an investigation into the salting backpay periods as required by *Oil Capitol Sheet Metal* has resulted in substantial harm to AMS. The Region has issued a compliance specification that openly fails to account for *Oil Capitol*. AMS is now being forced to expend substantial resources to answer an admittedly incomplete and lawfully defective Compliance Specification that ignores controlling Board law without any support. The Region should revoke and/or amend the Specification consistent with the law after conducting the required investigation of the union salting campaign involved in these cases.

MILLER JOHNSON

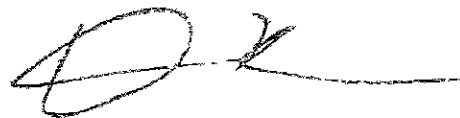
Mr. Mark D. Baines
National Labor Relations Board, Region 7
June 21, 2013
Page 3

Please let me know what the Region's position is on this matter at your earliest convenience.

Sincerely,

MILLER JOHNSON

By

A handwritten signature in dark ink, appearing to be "D. Buday", written over a horizontal line.

David M. Buday

DMB/kee/tlc

c: Allied Mechanical Services, Inc.
Annetta Stevenson (via e-mail)
Dennis Boren (via e-mail)

EXHIBIT 6



United States Government
NATIONAL LABOR RELATIONS BOARD
REGION 7

Patrick V. McNamara Federal Building
477 Michigan Avenue - Room 300
Detroit, MI 48226-2543

Telephone (313) 226-3200
Fax (313) 226-2090
Visit our Website www.nlrb.gov

Sent via Fax and U.S. Mail

July 2, 2013

David M. Buday, Esq.
Miller Johnson
100 West Michigan Ave.
Suite 200
Kalamazoo, MI 49007-3960

Re: Allied Mechanical Services, Inc.
Cases 07-CA-040907
07-CA-041390

Dear Mr. Buday:

This letter is in response to your letter dated June 21, 2013, concerning the above cases. Therein, you referenced our June 13, 2013, telephone conversation with respect to issues related to *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007).

You may recall that when we spoke early that morning, I said I was extremely busy but that I was willing to talk to you because the agent who is primarily responsible for these cases, Annetta Stevenson, is away from the office at this time. Also, I thought we were merely engaging in an informal conversation in which you were most interested in expressing your position regarding the need for the parties to come up with a way to obtain the missing interim earnings information, as well as your reiterating the need for a timely Regional decision on your request for an extension of time to submit a response to the Compliance Specification, and the need for a postponement of the hearing date. During our conversation, I never said I was providing all of the possible reasons that the Region believes the Board's rationale regarding salts, as enunciated in *Oil Capitol Sheet Metal, Inc.*, *supra*, is inapplicable to the instant cases. Had I understood that you were seeking a comprehensive delineation of those reasons, I would have told you that it would be much more helpful for me to provide you with a written explanation because it is not possible to fully express orally all of the elements involved without being able to

reference all of the relevant information. Indeed, at the time that we spoke, due to the exigencies of all of the other cases that I was working on, I was unable to reference any of the relevant material concerning these cases. I apologize if I did not sufficiently clarify this point.

Notwithstanding the points that you raise in your letter, one extremely salient point was not mentioned. The 10 employees at issue in the instant cases are very different than the sole individual involved in *Oil Capitol Sheet Metal*. The *Oil Capitol* individual was clearly a union organizer who only applied for employment with that respondent for organizational purposes. The 10 individuals at issue in the instant cases were already employees of your client, Respondent Allied. Although clearly supporters of the Union and its goals in the instant cases, these 10 individuals were not engaged in an attempt to organize the employees of Respondent Allied. The reason for this is quite simple – the employees of Respondent Allied were already organized and the Union was indeed their section 9(a) representative at the time. The United States Court of Appeals for the District of Columbia Circuit made an unequivocal ruling on this point in its decision on February 17, 2012, regarding Cases Nos. 10-1328 and 10-1385. It therefore follows that the 10 individuals in the instant cases could not have been salts engaged in organizing an already organized employer, Respondent Allied.

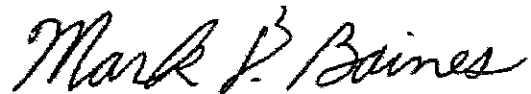
It also should be noted that, notwithstanding the characterization of them as salts by the administrative law judge (who had no way of foreseeing that such a characterization would ever have the additional significance that it attained under *Oil Capitol Sheet Metal* more than seven years later), these 10 discriminatees do not come close to fitting within the clear definition of salts provided by the Board in footnote 5 on page 1348 of *Oil Capitol Sheet Metal*:

“Salting” has been defined as “the act of a trade union in sending in a union member or members to an unorganized jobsite to obtain employment and then organize the employees.” *Tualatin Electric*, 312 NLRB 129, 130 fn. 3 (1993). Enfd. 84 F.3d 1202, 1203 fn. 1 (9th Cir. 1996). . . . “Salts” are those individuals, paid or unpaid, who apply for work with a nonunion employer in furtherance of a salting campaign.

The bottom line is that even if the points you made in your June 21, 2013, letter are accepted, the 10 individuals at issue clearly do not come within any possible definition of “salts” or even “salting activity” envisioned by the Board in *Oil Capitol Sheet Metal* or in any later salting cases, be they issued by a two or a three member Board. Respondent Allied was already organized under section 9(a) of the Act and the 10 individuals had been longstanding employees of Respondent Allied who were merely supporters of the objectives of the incumbent Union, which was not – and could not have been – engaged in a salting campaign of the already organized employer.

I trust that this explanation of the Region's position helps clear up any misconceptions. Commencing next week, please contact Annetta Stevenson regarding any matters having to do with the instant cases.

Very truly yours,

A handwritten signature in black ink that reads "Mark D. Baines". The signature is written in a cursive, flowing style.

Mark D. Baines
Compliance Officer

MDB/mdb

EXHIBIT 7



Radisson Plaza Hotel & Suites
100 West Michigan Avenue
Suite 200
Kalamazoo, MI 49007-3960



DAVID M. BUDAY
Attorney at Law

269.226.2952
269 978 2952 fax
BudayD@millerjohnson.com

July 11, 2013

VIA EMAIL AND FIRST CLASS MAIL

Mr. Mark D. Baines
Compliance Officer
National Labor Relations Board, Region 7
477 Michigan Avenue - Room 300
Detroit, MI 48226-2569

Re: Allied Mechanical Services, Inc.
Case Nos. 7-CA-40907 and 7-CA-41390
Application of *Oil Capitol Sheet Metal*

Dear Mr. Baines:

On June 13, 2013, during a phone discussion, you informed me that the Region had made the decision not to apply *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (2007) in this compliance matter.

The Region made this decision despite AMS's prior correspondence identifying the Board's findings, record evidence, and admissions that all of the individuals were paid union salts. As the ALJ in this case found, the individuals "were paid, and paid well, to be salts." *Allied Mechanical Services, Inc.*, 341 NLRB 1084, 1101 (emphasis added). These factual findings were never challenged or disputed. As such, they cannot be ignored in compliance simply because the Region may not like their legal impact.

1. The Region's First Reasons Offered in Support of its Decision to Ignore *Oil Capitol Sheet Metal* are Without Merit

Originally, you informed me that the Region made its decision to reject *Oil Capitol* for two reasons: (1) that all of the proceedings in AMS's case had concluded before the Board decided *Oil Capitol* in 2007; and (2) that the Board cases applying *Oil Capitol* retroactively were decided by a two-member Board that lacked a quorum to issue the decisions.

On June 21, 2013, AMS sent you a letter explaining why each of these two reasons was incorrect, asking the Region to apply *Oil Capitol* as controlling law. The evidence and undisputed facts confirm that many of the proceedings in this matter continued after the *Oil Capitol* decision in 2007. Moreover, we identified specific Board law (issued by three members) applying *Oil Capitol* retroactively under facts strikingly similar to those in our current case. *Contractors Services*, 351 NLRB No. 4 (2007).

MILLER JOHNSON

Mr Mark D. Baines
National Labor Relations Board, Region 7
July 11, 2013
Page 2

On July 2, 2013, you provided a written response to AMS's June 21 letter. In it, however, the Region fails to address the two reasons it previously cited in support of its position on *Oil Capitol*. We presume this is because, as explained in our prior letter, there is no factual or legal basis to support those claims.

2. The Region's Additional Reasons for its Rejection of *Oil Capitol* are Likewise Baseless; They Conflict with Conclusive Board Findings and Controlling Law.

Instead of responding to AMS's explanation of the defects in the Region's original two-pronged position, your July 2 letter attempts to offer new, additional reasons for the Region's refusal to acknowledge and follow *Oil Capitol*.

First, you assert that the individuals "were not engaged in an attempt to organize the employees of Respondent Allied" because the D.C. Circuit resolved a dispute on the Union's 9(a) status more than a decade after the fact. As explained below this claim is not only illogical, it is an impermissible attempt to ignore evidence, admissions, and binding Board findings that were not altered on appeal. Second, you paradoxically claim that these individuals were not engaged in "salting" as that term is construed by the Board, despite their admissions that they were paid union "salts." As demonstrated below, this position is also without merit and inconsistent with Board law.

a. *The Region's Claim that the Individuals "Were Not Engaged in An Attempt to Organize the Employees" Conflicts With the Undisputed Evidence, the Board's Conclusive Factual Findings, and Makes No Logical Sense.*

The Region's attempt to alter established facts and Board findings more than fifteen years after the fact is nothing short of breathtaking. The ALJ in this case unequivocally found that it is "undisputed that all ten unreinstated strikers, were at the time that they went on strike, being paid by Local 337 (or one of the other Michigan UA locals) to assist in organizing the Respondent's employees and were therefore 'salts,' as that term is commonly used in labor relations law." *Allied Mechanical Services*, 341 NLRB at 1095 (emphasis added). This point was never in dispute, and later in his decision, the ALJ reiterated his conclusion that these individuals were "salts," stating that they "were paid, and paid well, to be salts." *Id.* at 1101 (emphasis added).

These findings were not challenged, altered, or changed on appeal. If the General Counsel had an issue with the findings then he was required to except to the findings and have them reversed or altered by the Board or federal court on appeal. That didn't happen. Rather,

MILLER JOHNSON

Mr. Mark D. Baines
National Labor Relations Board, Region 7
July 11, 2013
Page 3

the ALJ's well-supported conclusions and factual findings were affirmed by the Board and the D.C. Circuit. The Region cannot brush them aside.

In addition, the Region's speculation about whether the ALJ contemplated the legal significance of his factual findings under *Oil Capitol* is no justification for refusing to follow *Oil Capitol*. The final findings and Board conclusions are factual, and facts are stubborn things. They do not change because one party does not like them. The bottom line is that these individuals were "salts," and the significance of that fact under *Oil Capitol* has nothing to do with the factual findings themselves.

Next, the Region's contention that these employees were not engaged in "salting" is also belied by the record evidence and admissions by the individuals. Although AMS will not detail here every piece of evidence supporting the fact that the individuals were salts, a few examples highlight the fundamental flaw in the Region's most recent position.

First, discriminatee James Bronkhurst testified as follows:

Q BY MR. BUDAY: In July of 1997, when you returned to work were you a paid Union Organizer?

A Yes.

Q And you were what is referred to as a salt. correct?

A Yes.

(Tr. at p 712.)

Similarly discriminatee Kevin Falk testified as follows:

Q Mr. Falk, at the time you were employed by Allied Mechanical Services in 1997, were you a paid union organizer or what's referred to as a salt?

A Yes, sir.

(Tr. at p. 551.)

Ted Fuller admitted the same:

MILLER JOHNSON

Mr. Mark D. Baines
National Labor Relations Board, Region 7
July 11, 2013
Page 4

Q During your employment with AMS in 1997, were you a paid union organizer, people that are referred to as salts?

A Yes.

(Tr. at p. 528.) The record contains similar testimony and/or other evidence for all discriminatees.

In short, the Region's position that the D.C. Circuit's final resolution of the parties' ongoing dispute as to whether the Union was a Section 8(f) or Section 9(a) simply does not alter these admitted and conclusive factual findings.

The Union paid these individuals as "salts" to organize and support the Union's strikes and other tactics such as precipitating unfair labor practice charges. It is also important to remember that neither the Board nor the D.C. Circuit ever concluded that a majority of AMS's employees supported the Union. There has never been any evidence of such majority support. Accordingly, it was no surprise that the Union continued its salting efforts, while at the same time arguing that the 1991 Settlement Agreement created a Section 9(a) relationship. That the Union's and General Counsel's arguments on the technical legal issue involving the meaning of the Settlement Agreement were successful does not alter what actually happened in this case and does not alter the undisputed fact that the individuals were salts.

b. *The Region's Position Mischaracterizes the Board's Cases on Salting*

Next, despite the binding findings and admissions described above, the Region maintains that the individuals in this case "do not come within any possible definition of 'salts' or 'salting activity' envisioned by the Board." (Emphasis added). The Region cites *Oil Capitol* in support, but this myopic, outcome-oriented view clearly conflicts with Board law and the facts and factual findings in this case.

As explained in our October 10, 2012 letter, the Board has repeatedly recognized that the goal of a salting campaign may be broader than simply organizing employees. Indeed a complete reading of the Board's decision in *Oil Capitol* confirms AMS's position on this point. The *Oil Capitol* Board explained:

A salting campaign's immediate objective may not always be organization. See, e.g., *Harman Brothers Heating & Air Conditioning v. NLRB*, 280 F.3d 110, 1112 (7th Cir. 2002) (noting that true objective of union salting campaigns often is "to precipitate the commission of unfair labor practices

MILLER JOHNSON

Mr. Mark D. Baines
National Labor Relations Board, Region 7
July 11, 2013
Page 5

by a startled employer”, and *Starcon, Inc. v. NLRB*, 176 F.3d 948, 949 (7th Cir. 1999) (noting that salts’ “proximate aim, in this case as commonly, is to precipitate an unfair labor practice proceeding that will result in heavy backpay costs to the employer . . .”).

Oil Capitol Sheet Metal, 349 NLRB No. 118 at n.5. The Board reiterated this point in *Toering Electric*, again making clear that “a salting campaign’s immediate objective may not always be organizational.” 351 NLRB 225, n.3 (2007). In *Toering* the IBEW’s salting campaign was designed to “put a big hurt” on Toering Electric’s business and to “drive the non-union element out of business.” These were hardly organizational purposes.

In the instant case, the evidence confirms that the Union not only continued its attempts to organize employees throughout the parties’ litigation through the use of admitted salts, but the Union also directed these salts when to strike and when to return to work in an effort to precipitate unfair labor practice charges and disrupt AMS’s operation. The notion that the employees’ actions in this case could not fall within any possible definition of “salting” under Board law is wrong and conflicts the Board’s findings—findings that were not challenged or changed on appeal.

3. Conclusion

AMS again asks the Region to correct its refusal to apply *Oil Capitol*. Its refusal to conduct an investigation into the salting backpay periods has resulted in substantial harm and prejudice to AMS. The Region issued a compliance specification that openly fails to account for *Oil Capitol*. AMS is now being forced to expend substantial resources to answer an admittedly incomplete and lawfully defective Compliance Specification. The Region should revoke and/or amend the Specification consistent with the law after conducting the required investigation of the union salting campaign involved in these cases.

Moreover, AMS continues to believe that a meeting where the Region and AMS can sit down and discuss this matter will go a long way toward resolving this case. Please advise as to whether the Region is agreeable to such a meeting and, if so, please provide dates and times that work for the Region.

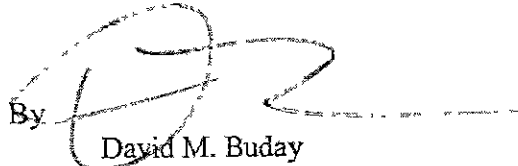
MILLER JOHNSON

Mr. Mark D. Baines
National Labor Relations Board, Region 7
July 11, 2013
Page 6

Please let me know if you have any questions.

Sincerely,

MILLER JOHNSON

By 
David M. Buday

DMB/kee/tlc

c: Allied Mechanical Services, Inc.
Annetta Stevenson (via e-mail)
Dennis Boren (via e-mail)

EXHIBIT 8

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CONTRACTOR SERVICES, INC.

and

Cases 10-CA-028856

10-CA-029123

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,
AFL-CIO, LOCAL 347

10-CA-029174

ORDER DENYING MOTIONS FOR RECONSIDERATION

On September 27, 2007, the Board, by a three-member panel, issued a Supplemental Decision and Order in this proceeding, which is reported at 351 NLRB 33. On August 27, 2008, the two sitting members of the Board issued an unpublished Order Denying Motions for Reconsideration in this proceeding.¹ Thereafter, the Charging Party filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit. Thereafter, the court ordered that the review proceedings be held in abeyance, and the record in this case was not filed with

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the powers of the National Labor Relations Board in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Thereafter, pursuant to this delegation, the two sitting members issued decisions and orders in unfair labor practice and representation cases.

the court. On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. Thereafter, the court of appeals dismissed the petition for review. On August 17, 2010, the Board issued an Order setting aside the above-referenced Order Denying Motions for Reconsideration and retained the case on its docket for further action as appropriate.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.²

The Board has considered the General Counsel's and the Charging Party's motions for reconsideration and the Respondent's separate replies to each motion and has decided to affirm the Order denying the motions for reconsideration to the extent and for the reasons stated³ in

² Consistent with the Board's general practice in cases remanded from the courts of appeals, and for reasons of administrative economy, the panel includes the remaining member who participated in the original denial of the motions for reconsideration. Furthermore, under the Board's standard procedures applicable to all cases assigned to a panel, the Board members not assigned to the panel had the opportunity to participate in the adjudication of this case at any time up to the issuance of this Order.

³ Member Hayes finds that the law of the case doctrine does not apply here for the reasons set out by then Chairman Schaumber at fn. 4 of the August 27, 2008 Order.

the unpublished August 27, 2008 Order Denying Motions for Reconsideration, which is incorporated herein by reference.⁴

Dated, Washington, D.C., December 20, 2010.

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

⁴ On Aug. 13, 2010, the Charging Party filed a Motion to Consolidate Cases and Solicit Briefs from Parties and interested Amici on issues raised by the Board's decision in *Toering Electric*, 351 NLRB 225 (2007); *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007); and *Contractor Services*, 351 NLRB 33 (2007). Specifically, the Charging Party requested that this proceeding be consolidated with *KenMor Electric Co.*, 355 NLRB No. 173 (2010), and *Independent Electrical Contractors of Houston*, 355 NLRB No. 225 (2010), which were then pending before the Board, and that the briefs solicited address whether *Toering Electric*, *Oil Capitol*, and *Contractor Services* should be applied in these cases. The Charging Party moves in the alternative that the Board solicit briefing from the parties to the instant case, as well as interested amici, on the question of whether the Board should overturn its decision in *Contractor Services*, *supra*.

We deny both motions. First, the request to consolidate is moot. Second, with respect to the Charging Party's request to solicit briefs to address whether *Contractor Services* should be overruled, we have duly considered the request, but are not prepared at this time to deviate from precedent.